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An action for recovery of damages for illegal distraint by a deceased person abates on the death of the distrainor when part of the distrained property was misappropriated by the latter's servant and the rest perished.

The only cases in which apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased who has done the act appear to be those in which the property or the proceeds or the value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys.

Philips v. *Homfray* 24 Ch. D. 439. referred to.

S. 2 of Act XII of 1855 has no application to a suit instituted against the wrongdoer himself in his life time.

Hari Rao Ramadas v. Ramdas Mathuradas, I. L. R. 13 B. 677, *Ramchola Das* v. *Rukmanibai* I. L. R. 28 M. 487. referred to.

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Act XIX of 1841—*Curators in cases of Succession Act Ss. 3 and 4—Appointment of Commissioner to make an inventory when valid—Malabar Law—Death of Karnavan—Devolution of property.*

Act XIX of 1841 does not apply to cases where property lapses by survivorship, as in the case of the death of a Karnavan of a Malabar tarwad, when the property in his possession, whether tarwad property or self-acquisition, goes to his tarwad.

An order appointing an officer to take an inventory otherwise than in the course of an inquiry contemplated by S. 4 is bad in law.

Obiter :—The Act pre-supposes cases of succession and if there are directions as to the disposal of the property the judge should give effect to them in a summary proceeding without considering their validity.

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Arbitration—*Award—Essentials—Constitution of—Strangers—Private reference pending a suit—Validity* of—*C. P. C. (XIV of 1882) Ss. 375, 525*.

Parties to a pending suit are legally competent to refer the matters in dispute to a private arbitration without the help of the court; and especially so when the reference is even by persons other than the parties to the suit.

S. 525 of the old Code applied to an award made on a private reference by parties pending a suit in court.

An award need not be a reasoned judicial decision and arbitrators need not even give their reasons for their conclusions.

Arbitrators can get the help of others' opinions in arriving at their own opinions provided they do not thereby delegate or surrender their own judgments.

A private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement, compromise and adjustment within the meaning of 375, C. P. C. (XIV of 1882).

Quære :—Whether a mere reference to arbitration can be a valid adjustment under S. 375, C. P. C. so that a decree might be passed under the section.

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Bengal Acts (XI of 1859) S. 2, and (VII of 1868)—*Arrears—Revenue sale—Validity of—Jumma in arrears—Settlement Manual—Settlements—Ordinary dates of payment of Kists, value of—Statute—Construction.*

No variation of the contract of parties and the statutory provision applicable thereto is possible by reason of general considerations or administrative rules which have not the sanction of the Indian Statute.

Act XI of 1859 (Bengal) does not sanction and by plain implication forbids the sale of any estate which is not at the time in arrear of Government revenue, the whole clauses of Act XI of 1859 (Bengal) as well as the provisions of S. 2 of Bengal Act VII of 1868 are framed upon the express footing that they are to

Bengal Acts—(*Contd.*) PAGE.

be applicable to the sale of estates which are in arrear of duty; *Balakishen Das* v. *Simpson*, I. L. R. 25 C. 833 (P. C.) referred to.

The Kabuliat of the proprietor of the estate in the case (the holding being a Government tenure in Dihi Panchanagaram in the district of 24 Pergunnahs) stipulated that the jumma for every year shall be payable in the Collectorate, within the 28th June of every year. S. 2 of Act XI of 1859 (Bengal) did not make the rent payable under the Kabuliat on the 28th June "an arrear" within the meaning of the Act till the 1st July thereafter. The notification of the Board of Revenue issued on the 4th of December 1871 fixed "the 28th June of each respective year as the latest day of payment of the rents of all description and tenure in Khas Mehal Panchanagaram to that date; and tenures *in arrears* in the Mehal will be sold at the public auction to the highest bidder."

Held: the jumma in question in the case was not in arrear until the 1st July 1902, that the 28th June 1903 was the first date under the proclamation and the statute when there had arisen such a default as would enable the "*tenure in arrears*" to be sold; and that consequently the sale in March 1903 was invalid.

Held also that the ordinary dates of payments, rules contained in the Survey and Settlement Manuals and the date of the settlement itself were irrelevant to the consideration of the questions as to when an estate was in "*arrears*," of the *jumma* within the meaning of the statutes and as to when the estates by reason of the "*arrears*" became liable to be sold for default within the meaning of the statutes and the proclamation of the Board of Revenue;

Held also that Act VII of 1868 (Bengal) in applying Act XI of 1859 did not intend that any distinction should be made with reference to procedure and with reference to what constituted arrears.

Haji Buksh Elahi v. *Durlav Chandra Koer*. P. C. 206

Bengal Land Revenue Sales Act VII of 1868—*Incumbrances, meaning of—Court Sale and subsequent revenue sale—Competing titles of mortgagee purchaser and revenue purchaser—Mortgagee purchaser's right to use his mortgage as a shield after his purchase.*

The effect of Section 54 of the Bengal Land Revenue Sales Act is that a revenue vendee takes nothing less nor more than what belonged to the former owner and it negatives the idea that it is open to an owner to protect himself as by "a shield" against the consequences of the full transfer to him by his purchase by keeping his incumbrance alive against the revenue vendee.

A mortgagee who purchases the mortgagor's right in execution of a decree obtained by him on his mortgage cannot protect himself as by "a shield" against the consequences of the full transfer of ownership to him against a purchaser in revenue sale held for arrears of revenue accrued due subsequent to the date of the mortgagee's purchase.

The mortgagee purchaser cannot be permitted to say to the mortgagor that the ownership had been transferred to him on a certain date and to say to an outsider, like the Collector of Revenue, that the ownership had not been transferred to him.

It is unsafe to apply considerations as to the rights of prior and succeeding mortgagees and principles of keeping one's lien alive applicable between them to questions of title arising between a mortgagee-purchaser of the property and subsequent purchaser at a revenue sale of the same property.

Bengal Land Revenue Sales Act—(*Contd.*) PAGE.

A mortgagee brought a suit on his mortgage, obtained a decree and in execution thereof purchased the property on a certain day (on 19th March 1900). A few days later *i. e.*, on the 28th March 1900, the Government Revenue on it fell into arrears and the property was sold for arrears of revenue.

Held, on the question of the competing titles between the mortgagee-purchaser and the revenue purchaser that the mortgagee-purchaser could use his mortgage as a shield against the revenue purcharser.

(2) That the mortgagee purchaser took the property on the date of sale subject to all its liabilities.

(3) That the revenue purchaser was entitled to the possession of the property as against the mortgagee—purchaser.

(4) That the mortgagee was not an incumbrancer within the meaning of Section 54 of Land Revenue Sales Act, Bengal, after the court sale.

(5) *Obiter* :—If there had been any accretions to the property between the date of court sale and the date of confirmation they would have become the property of the mortgagee-purchaser.

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1. C. P. C. S. 11 Exp. IV Act V of 08—" *Directly and substantially in issue* "—" *Heard and decided* "—" *In issue* "—*Propriety of patta, issue on, how far directly and substantially in issue in rent suit—Subsequent suit for rent of subsequent fasli—Extent of holding—Question of.*

Plaintiff brought a suit for rent due for fasli 1316. Defendant raised the plea that the patta tendered was not a proper patta and that the extent of defendant's jeroyati land had been very much overstated in it than was really the case. The plaintiff had previously brought a suit for rent for faslies 1314 and 1315 and had obtained a decree. The patta then tendered was similar to the one tendered for the suit fasli and the issue in the previous suit was :—" Whether plaintiff tendered pattas to the first defendant and whether the pattas so tendered were proper." The decision then was that there was tender and that there was nothing objectionable in the patta.

Held per Curiam concurring with *Munro* J. and dissenting from *Sankaran Nair* J :—that the plea of the defendants was barred by *res judicata* by reason of the decision of the issue in the prior suit for faslies 1314 and 1315.

C. P. C.—(*Contd.*) **PAGE.**

The decision as to the extent of the holding was directly and substantially in issue in the prior suit.

2. The decree for rent in the prior suit involved the decision that proper patta had been tendered.

3. Even otherwise, the question must be deemed to have been directly and substantially in issue by virtue of Expl. IV to S. 11 C. P. C.

Per Sundara Aiyar J :—In order to constitute *res judicata* it is not necessary that there should be an *express* decision.

2. The test is whether the matter was essential for the decision in the former suit and not whether it was essential for the relief granted.

The rule of an essentially implied decision being *res judicata* is not confined to the decision of the suit, but also applies to the decision of an issue in the suit; and the language of Expl. IV is equally applicable to both.

Per Sadasiva Aiyar J. *Obiter.*—Where the subject matter of the former litigation and the relief claimed therein were the same as those claimed in the subsequent litigation, courts should try their best to hold that the causes of action in such cases are substantially the same. *Arunachellam Chetty* v. *Meyappa Chetty* I. L. R. 21 M. 91 approved. *Ramasawmi Iyer.* v. *Vythinatha Iyer* I. L. R. 26 M. 760 dissented from *Thrikaikal Madathal Ranah* v. *Thrikaikal Krishnan Nair* I. L. R. 29 M. 153 commented on.

Observations by *Sundara Aiyar* and *Sadasiva Aiyar* JJ. as to when a defence will be *res judicata.*

Bayyan Naidu v. *Suryanarayana* 543

2.———**S. 16 Cl. (d)**—*Declaration that mortgage is not binding—Forum.*

A suit for a declaration that a mortgage in favor of some defendants is invalid against plaintiff is governed by cl. (*d*) of S. 16 C, P. C.; and a Court having no territorial jurisdiction over the area in which the properties affected by the mortgages are situate has no jurisdiction to try the case.

Arunachella Chettiar v. *Muthiah Chettiar* 679

3.———**S. 24 Cl. 4, S. 96**—*"Small Cause Court"—Court invested with Small Cause Jurisdiction—Appeal from decree on Original Side in a Small Cause Suit—" Trying any Suit "—" From a Small Cause Court " —Transfer of Small Cause Suit to Original Court—Direction to try as Original Suit.*

The words "Court of Small Causes" in S. 24. Cl. 4, C. P. C. includes Courts invested with Small Cause Jurisdiction.

No appeal lies from a decree of a District Munsif on the original side in a suit transferred to him for trial from a Subordinate Judge's Court on its Small Cause Side, *Ramachandra* v. *Ganesh* I. L. R. 23 B. 382 and *obiter* in *Dulal Chandra Deb* v. *Ram Narain Deb* I. L. R. 31 C. 1057 dissented from, and the same will be the case even though the suit was not immediately transferred to the trying court from the Small Cause Side of the Subordinate Court but after an intermediate transfer to another Munsif's Court on its original side.

Per *Sundara Aiyar* J.—The transfer by the District Judge of a Small Cause Suit to an original Court is itself valid, but not the direction to try it as an Original Suit; and the invalidity of the direction does not affect the validity of the transfer itself.

Sankararama Aiyar v. *Padmanabha Aiyar* 373

C. P. C.—(*Contd.*) PAGE.

4.————**Ss. 47 (2) 50**—" *Objection by legal representative that proper procedure was in execution in court which passed the decree—Jurisdiction of executing court to convert suit against legal representative into execution proceedings.*

When objection is taken by a legal representative of a deceased judgment-debtor that the proper method of procedure against him was to proceed by way of execution in the court which passed the decree under S. 50 C. P. C., the Court to which the decree has been transferred for execution cannot cure the defect by treating the suit as a proceeding in execution under Cl. 2 of S, 47.

Nachiappa Goundan v. *Ponnusamy Naicker* 287

5.————**Ss. 85, 87**—*Suit against the State of Travancore—Jurisdiction of British Indian Courts—International law.*

A suit against the state of Travancore or its Dewan for damages for wrongful dismissal is as much against the sovereign Prince or ruling chief within the meaning of S. 85 C. P. C. and is not maintainable in British Indian courts without the consent of the Governor-General in council.

Gilmore v. *The State of Travancore* 605

6.————**S. 100**—*Question of law—Misconstruction of document—Wrong inference—Wajib-ul-arz—Evidentiary value.*

The right construction of documents is a question of law which Judges in second appeal are not by Ss. 584, 585 C. P. C. (XIV of 1882) precluded from considering by any finding of the lower appellate court, based upon such documents.

Where the lower appellate court arrived at a finding by inferences drawn upon an incorrect construction of the wajib-ul-arz;

Held:—That the Judges in second appeal were not bound by the finding.

The wazib-ul-arz is cogent evidence of the rights as they existed when it was made of those holding proprietory or other rights of property within the Mauza.

Fateh Chand v. *Kishen Kunwar*. (P. C.) 330

7.————**S. 102.**—*Suit of small cause nature—Suit for recovery of melwaram—Declaration asked for—No Court fee paid—No Second appeal.*

Where the prayer for declaration of right to receive melwaram is only incidental to the prayer for recovery of rent and no separate court fee was paid in respect of the declaration, no second appeal is competent in the case.

Veera Raghava Aiyangar v. *Vellai Mooppan* 517

8.————**S. 110**—*Privy Council–Leave to appeal–"Affirming the decision" Order dismissing the appeal as out of time—Appeal from order—Questions involved in—Admission Court's order admitting appeal out of time not conclusive.*

An order the result of which is that the lower court's decision stands unaltered as a result of the disposal of the appeal from it, is an order affirming the decision of the lower court within the meaning of S. 110, Civil Procedure Code.

An order dismissing an appeal as out of time is an order affirming the decision of the lower court; and the question in appeal from the order so dismissing the appeal will be only about the order of dismissal and cannot be said to involve a substantial question of law.

C. P. C.—(*Contd.*) PAGE.

The order of the admission court admitting an appeal presented out of time without notice to the opposite side can be objected to by the respondent at the hearing of the appeal itself.

Krishnasami Panikondar v. *Ramasami Chettiar* 219

9.———(XIV of 1882) S. 295—"*Money Decree*" — *Mortgage Decree expressly exempting personal liability—Collusion and corrupt bargain between judgment-debtor and decree-holder in getting a personal decree —Proof.*

A mortgage decree for sale containing an express provision exempting the defendants from personal liability is in no sense a "decree for money" within the meaning of S. 295 Civil Procedure Code (XIV of 1882.)

It is open to one decree-holder to prove collusion or a corrupt bargain between the judgment-debtor and another decree-holder in the former consenting to a personal decree being passed against him in favour of the latter so as to entitle the latter to rateable distribution; and a court if satisfied of the collusion or corrupt bargain will not allow rateable distribution.

Suryanarayana Jagapati Raju v. *Gopala Surya Rao* .. ..

10.———(XIV of 1882) S. 315—"*Right of suit for refund of price money by court sale purchaser—Limitation Act, Art. 120, 62, 97.*

An auction purchaser had a substantive right of suit under the Code of 1882 for refund of the price money paid by him when it was found that the judgment-debtor had no saleable interest; and Art. 120 of the Limitation Act applied to such suits. A right for refund which arose under the old Code has not been taken away by the Code of 1908.

Per Napier J. (*Ayling* J *Dubitante*)—Under the Code of 1908 the auction purchaser has no substantive right entitling him to recover his money by suit, but only a right to get an order in execution proceedings for repayment and that too, only if he discovers the absence of title in the judgment-debtor before the confirmation of sale and not otherwise.

Mohideen Imbrahim v. *Mahomed Mura Levai* 487

11.———(XIV of 1882, S. 313 and 315)—"*therein*"—*Single lot—no saleable interest in some items of one lot no ground.*

The Court cannot for the purposes of S. 313, C. P. C.. (XIV of 1882) sever a single sale and a sale cannot be set aside on the ground that the judgment-debtor has no saleable interest in some of several items which formed the subject matter of a sale in a single lot.

Krishnama Naicken v. *Kandasamy Gounden* 108

12.———XIV of 1882 S. 373. See Execution Sale 658

13.———XIV of 1882 S. 375. See Arbitration.. 290

14.———S. 424 (XIV of 1882)—*Suit for injunction—Statute—Construction—Punctuation.*

S. 424 of the old Code makes notice necessary in all suits against the Secretary of State for India in Council including suits for injunction.

Per *Sundara Aiyar* J :—Quære :—Whether the English law rule that punctuation cannot be taken account of in the interpretation of statutes should be applied to Indian Statutes ?

C. P. C.—(*Contd.*) PAGE.

The phrase "purporting to be done" in S. 424 C. P. C. applies only to public officers.

Secretary of State v. *Kalikhan* 181

15.————**XIV of 1882 S. 525.** See arbitration 290

16.————**XIV of 1882 S. 539**—*New Code S. 92—Scheme—Considerations for Court—Rights of parties—New trustees—Limitation Act Article 124—Continuous possession—Independent trespassers—Addition of parties in Appeal—Old and New Code—Retrospective effect.*

A Court in framing a scheme regarding a temple is bound to have regard to the existing rights of individuals to the trusteeship of the temple.

Twelve years' continuous possession is necessary under Article 124 to bar a right to trusteeship; and if the possession has been in the hands of independent trespassers it would not be regarded as continuous possession on the part of the defendant-trespasser; but where the independent trespassers have all derived title from the same source it may be sufficient to justify a Court in holding that the possession was continuous within the meaning of the article.

Courts are averse to the creation of a hereditary right to the office of a public trustee.

Obiter :—Courts in India have the same powers as the Court of Chancery in England to appoint additional trustees; and certainly so under S. 92 (C. P. C. of 1908.)

Veeraraghava Thathachariar v. *Srinivasa Thathachariar.* 134

17.————**539 (Act XIV of 1882)**—*Scope of—Suit by a trustee against a trespasser*

S. 539 of Act XIV of 1882 is applicable only in cases of an alleged breach of express or constructive trust created for a public or charitable purpose. The section is applicable only to a suit *against* a trustee and not to a suit by a trustee against a trespasser.

Arunachella Chetti v. *Muthu Chettiar* 347

18.————**XIV of 1882 S. 539**—*Scope of—Suit by the representatives of founder for preventing abuse of trust—Suit by worshipper in ejectment against trespasser—"Interested"—Meaning of—Limitation Act Articles 44 and 47—Adverse possession.*

S. 539 of Act XIV of 1882 does not repeal or affect the right of a private individual to institute a suit to enforce the proper observance of a religious endowment.

The representatives of the founder of a religious endowment are entitled to maintain a suit for the purpose of having abuses in the trust rectified.

Persons of the same sect and form of religious worship as that of the founder of a religious endowment founded for carrying on the sectional religious worship are persons interested in the due performance of the said sectional religious worship and competent to maintain a suit in ejectment against an intruder.

Possession of the Pujari cannot be adverse to the worshipper.

Article 47 of the Limitation Act (1877) can be no bar to a suit by a person not a party to the order referred to in the article.

Srinivasacharlu v. *Subuddhi* 348

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C. P. C.—(*Contd.*) PAGE.

19.————**(S. 583 Act XIV of 1882)**—*Restitution of money taken in execution by assignee of decree—Reversal of decree and party to appeal—Blowing hot and cold.*

A Judgment-debtor from whom the assignee of a money decree has realised the decretal amount in execution is entitled to recover it back from the latter on a reversal of the decree in appeal, even though, the assignee was not brought on record in the appeal.

Tangijoghi v. *Hall* I. L. R. 23 M. 203, followed ; *Lalta Prasad* v. *Sadiq Hussain* I. L. R. 24 A. 288 dissented from.

A party cannot be heard to say that the procedure to which he himself successfully objected in a former proceeding between himself and his opponent was itself the proper procedure to be pursued by the appellant.

Govindappah v. *Hanumanthappa* 513

20.————**(XIV of 1882) S. 596**—*Concurrent finding—Judgment not containing materials for arriving at a conclusion—Judgment not vitiated by omission—Pardanashin lady—Deeds by—Onus.*

It will be to misconstrue entirely the provisions as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances of the case minutely and completely exhaustive, under the penalty that if they fail to do so the absence of elementary considerations in their minds might be presumed. The circumstance that the trial judge in the course of a long judgment did not set out certain materials of an elementary character for arriving at the conclusion at which he arrived on a question of fact will not take the case out of the rule that in case of concurrent findings of fact the right to appeal to the Privy Council depends upon the case involving a question of law. *Kuruppannan Servai* v. *Srinivasa Chetty* L. R. 29 I. A. 39. followed.

In the case of deeds and powers executed by Pardhanashin ladies it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by them. *Shambadi Koer* v. *Jago Badi* L. R. 29 I. A. 131 and *Tacoordeen Jewarry* v. *Nawab Syed Ali Husain Khan* L. R. 1 I. A. 192 at 206 followed.

Mirja Sajjad Hussain v. *Wazir Ali Khan* 210

21.————**O. 21 r 89 (b)**—*Amount specified in the proclamation of sale.*

In an application to set aside a sale on deposit under O. 21 r. 89, it is necessary to deposit under Cl. b of r. 89 only the amount specified in the sale proclamation as that for the recovery of which the sale is ordered not the amounts of the decrees of other judgment-creditors entitled to rateable distribution.

Veera Raghava Patter v. *Mannadissier* 585

22.————**O. 41, rr 5 and 6, O. 39 r. 1**—*Jurisdiction—Stay when to be granted—Annoyance to feelings no ground.*

In an application for stay of execution the Court has to be satisfied that the appellant is likely to sustain substantial injury if execution is not stayed ; and it is not usual to grant a stay if the appeal itself does not raise fairly arguable questions. Mere annoyance to feelings cannot be a ground for a stay of execution, since pecuniary or tangible loss should be shown for justifying a stay.

C. P. C.—(*Contd.*) PAGE.

In an application for a temporary injunction the Court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interests requires that an injunction should be issued temporarily.

Quære :—Whether the High Court has jurisdiction to grant an injunction in the case; and whether when a party sues for a permanent injunction to restrain his opponent from doing a wrongful act, the opponent should have the right of restraining the plaintiff from doing the very act he claims to be entitled to do and himself be allowed to do the act which is objected to by the plaintiff.

Ramanuja Aiyangar v. *Aiyana Chariar* 315

23.———O. 41, rr. 6, 125,—*Court to which application for stay of sale should be made.*

An application for stay of sale of immoveable property should be made only to the Court which passed the order for sale.

Kanniyappan Chetty v. *Manikkavasagam Chetty*.. 677

Companies Act—*Certificate of incorporation —Conclusive proof of validity—Civil Procedure Code. S. 11 Expl. IV—" Might and ought."*

The certificate of incorporation by the Registrar under the Companies Act is conclusive for all purposes; and when once the certificate of incorporation is given, nothing is to be enquired into as to the regularity of the prior proceedings.

Peels Case, L. R. 2 Ch. App. 674. *Oakes* v. *Turquand* L. R. 2 Ex. 1 App. 325 approved. *National Debenture and Assets Corporation* L. R. 2 Ch. 505. dissented from.

Plaintiff's father procured the registration of a limited company and conveyed all his properties to the said Company. Plaintiff first brought a suit to set aside his father's will which deprived him of the father's estate. On the same being dismissed he brought a second suit for declaring the invalidity of the incorporation of the company. All the facts on which the second suit was based were known to the plaintiff and were stated at length in the proceedings of the first suit. No further evidence would have been needed. Nothing was wanting in the first suit except the addition of an issue on the point of incorporation.

Held that the case fell within *Kameshwara Prasad* v. *Raj Kumari Ruttun Koer* L. R. 19 I. A. 234. and was barred by *res judicata* S. 11 Expl. IV.

Moosa Goolam Ariff v. *Ebrahim Goolam Ariff* 215

Compromise and family settlement—*Validity of—Consideration for Courts.*

In judging of the validity of a compromise Courts are not entitled to enquire into the rights of parties as they stood before the compromise to see whether the compromise has recognised them; they are only entitled to enquire whether the claim advanced by either side were *bona fide* and whether the compromise was really in settlement of such claims. Every compromise may involve the giving up of certain claims to which a party may be rightly entitled and the acquisition of interest to which he may have no claim. If the compromise is a settlement of disputes advanced *bona fide*, then, *prima facie* it ought to be upheld; and this reason applies with greater force in the case of family settlements where the peace of the family was involved

Authi Lakshmi v. *Annasami Iyer* 104

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Contract Act S. 74—*Penalty and liquidated damages—Distinction—Contract—Construction—Cause of action.*

Whatever be the expressions used in a contract describing the amount fixed in it as damages to be paid on breach of a covenant or contract, the question must always be whether the agreement to pay the damages fixed renders it unconscionable and extravagant and one which no court ought to allow to be enforced.

No hard and fast rule can be laid down as to what may or may not be extravagant or unconscionable to insist upon. It depends upon the facts and circumstances of each case at the time when the stipulation was made—*i.e.*, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract.

When it was impossible to foresee the extent of injury to the parties on breach, where loss was likely to be serious and the very uncertainty of it made it most reasonable for the parties to agree beforehand as to what the damages should be, especially having regard to the difficulties and expenses there will be in the proof of the amount of loss :—*Held* that the amount fixed as liquidated damages in case of breach was not a penalty.

Plaintiff and defendant agreed that the defendant should not be at liberty to sell during a certain period "the whole or *any part* of the tea crops of certain estates" to any person other than the plaintiff without first offering him for buying the same on certain conditions and the agreement fixed £ 500 as liquidated damages to be paid by defendant to plaintiff on breach of the covenant.

Held on a construction of the contract that "part of a crop" meant not packets which might be sold over a grocer's counter but several parcels of the same crops whether the sale be of the whole or part of the crop, whether in one lot or in many; and that the sale of portions of the same crop as in the case before their Lordships could not amount to more than a single breach for which the penalty fixed was £500 on the whole.

Webster v. *Bosanquet* (P. C.)	177
————*Breach of*—See Document	77

1.Cr. P. C—*Sessions Division—Ganjam Agency—Forum of appeal from decision of first class Sub-Divisional Magistrate exercising power in agency and non-agency tracts.*

The Magistrates of the Agency District of Ganjam are not, as such, in any way, Subordinate to the Sessions Court of the non-agency District. Nor does the fact that the same person is a first class Sub-Divisional Magistrate in both the agency and non-agency Districts make him subordinate to the Sessions Court of the Ganjam Sessions Division in regard to the Magistrate's Jurisdiction in the Agency District.

The proper forum of appeal in a criminal case from the decision of a first class Sub Divisional Magistrate in the Ganjam District in a case which arose within the agency tracts is the Sessions Judge of the agency Sessions Division *i.e.*, the District Magistrate and not the Sessions Division of the Ganjam non-agency tracts.

Cr. P. C.—(*Contd.*) PAGE.

The terms "Deputy Magistrates" and "General Deputy Magistrates" are titles unknown to the Code of Criminal Procedure.

The advisability of officers bearing in mind the several capacities in which they act from time to time and also of the Government bearing the distinction between the agency and non-agency districts in the judicial use of the term in issuing notifications pointed out.

Public Prosecutor v. *Sadananda Patnaik* 670

2.———**Ss 96, 105. Sch II.** *Form "Court" Judicial Officer's Protection Act—Arms Act S. 25.*

The word "court" in S. 96 Criminal Procedure Code includes a Magistrate, and a Magistrate is perfectly within his jurisdiction in directing a search to be made in his presence in view of any inquiry about to be made by him.

Obiter. When a Magistrate directs a general search of a house in view of an enquiry under the Criminal Procedure Code, in discharge of his judicial functions, he may well appeal for protection under Act XVIII of 1850.

In order that a Magistrate may plead S. 25 of the Arms Act in defence to an action for damages for trespass of plaintiff's house the preliminary conditions prescribed by the act should have been complied with.

Clarke v. *Brojendra Kishore Roy Choudhry* (P. C.) 32

3.———**S. 110**—"*Within the local limits of his jurisdiction.*"

It is not necessary that the person from whom security is taken under S. 110 Criminal Procedure Code should be a person *resident* within the local limits of the jurisdiction of the Magistrate.

Kora Rangan In re 535

4.———**(Act V of 1908), Ss. 145, 435, 439**—*Revision of proceedings under S. 145—Omission to record grounds—Irregularity in procedure.*

No revision lies against an order passed under S. 145 of the Criminal Procedure Code, either under S. 439 or under S. 435. The essential requisities to give a Magistrate jurisdiction under S. 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning "land or water, or the boundaries thereof" in his jurisdiction. Once so satisfied his jurisdiction is complete and subsequent action must be considered in relation to procedure and not in relation to jurisdiction.

An omission to record grounds in the preliminary order is not a defect of jurisdiction.

The High Court does not usually interfere under S. 15 of the Charter Act as regards orders passed under S. 145 of the Criminal Procedure Code except in cases where the Magistrate had no jurisdiction to pass the order.

Kamal Kutty v. *Udayavarma Raja Valia Raja* 499

5.———**Ss. 165 cl. 2, S. 103**—'*Conducting in person'—Meaning of—compliance with provisions of S. 103—Effect of.*

S. 165 Criminal Procedure Code only requires that the officer referred to in cl. (2) should be present on the spot and exercise a general supervision over the search in *contra distinction* to cases where he is unable to go to the spot and deputes a subordinate by written order to conduct the search in his place.

The words "*in person*" in cl. (2) do not mean that the officer *conducting* the search must himself make the search, *e. g.*, ransack boxes, examine the roof dig up the floor, or otherwise seek for the property. *Venkattappa Naidu* v. *King-Emperor*, 17 M. L. J. 323 dissented from.

Cr. P. C.—(*Contd.*) PAGE.

Failure to strictly comply with the provisions of S. 103 Criminal Procedure Code *e. g.*, in calling the inhabitants of the locality as witnesses does not make the search *per se* illegal. *Queen-Empress* v. *Raman*, I. L.R. 21 M. 83 followed.

Sadagopa Charlu v. *Satrughna Behara* 445

6.————Ss. 208, 210, 213, 347—*Magistrate's duty to issue summons to witnesses named by accused—Late application.*

The procedure that has to be followed by a committing Magistrate with regard to evidence *produced* before him by the accused is quite different from that prescribed in regard to evidence not produced before him but what the accused desires him to obtain by the issue of process.

An accused cannot delay asking for processes against witnesses until the last moment; and a Magistrate is under no duty to issue summons merely because the accused asks for them if in his opinion there be no sufficient grounds to grant the application.

Obiter;—The directions in S. 347 Cr. P. C. "to stop further proceedings" only signifies "stopping" proceedings *as a trial.*

Sessions Judge of Coimbatore v. *Kangaya* 368

7.————S. 438—*Report to High Court by District Magistrate of proceedings in Sessions Court.*

District Magistrate cannot report proceedings of Court of Sessions. *Emperor* v. *Jamna Bai* I. L. R. 28 A. 91 and *Empress* v. *Jahamdi* I. L. R. 23 C, 251 followed.

Angamuthu Vanathrian 732

8.————S. 476. *See Jurisdiction—High Court certiorari.*

Dharkast *by Government—Estoppel—Fraud.*

A person to whom lands were given on Dharkast by Government has a valid title to the land so given, even though he had represented orginally to the defendant that he (the plaintiff) would not press his preferential claim to get the Dharkast as an adjoining owner and the defendant had on that representation spent much money in clearing the land of prickly pear before the actual termination of the Dharkast proceedings. *Secretary of State for India* v. *Bundeppa of Konakondla* I. L. R. 32 M. 300 explained.

Periyathambi Gounden v. *Periya Gounden* 593

Document—*Construction—Breach of contract.*

A deed ran as follows:—" In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and agents of the Tricumdas Mills Co., Ltd., to advance to the Mills, a sum of Rupees one lac and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of eleven lacs of rupees as the first mortgage of the mill's block property, and to pay to you thereout the said sum of rupees one lac and fifty thousand agreed to be advanced by you to the mills "

Held on a construction of the deed that it amounted to a substantial undertaking that a loan should be procured by the executant and not merely that he would find somebody willing to lend and that he was to do nothing further except the payment to the addressee out of the loan of a lac and a half if the arrangement were carried through.

Vassanji Khimji v. *Sapurji Burorji Bharncha* (P. C.) 77

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Estoppel—*Attestation, effect of—Estoppel as the cause of action—Estoppel as an answer to a plea in bar of plaintiff's claim—Civil Procedure Code S. 317.—Scope of.*

Per *Curiam*: Attestation will in certain circumstances create an estoppel.

Per *Sundara Aiyar* J.—No actual verbal representation is necessary to give raise to an estoppel.

Where a purchaser in court auction attests the sale deed relating to the property purchased by him by a third peason and it is impossible to doubt that the object of the attestation was to re-assure the purchaser from the third person that the latter had title to the property as against the attestor, *held* that the attestation estopped the court-sale purchaser from asserting his own title to the property; and if, after the said sale by the stranger the certified purchaser obtains a certificate from court in respect of his purchase in court sale, *held*, that it was fraudulent on his part to so obtain a sale certificate after his attestation and that the said fraud fell within S. 317 Civil Procedure Code (XIV of 1882).

S. 317 Civil Procedure Code (XIV of 1882) is no bar to a plea of estoppel based on facts, subsequent to the court sale.

Per *Sadasiva Aiyar J.*—Attestation by a person who has or claims any interest in the property covered by a deed of transfer is *prima facie* a representation by him that the title and other facts relating to the title recited in the document are true and will not be disputed by him as against the obligee under the deed.

Obiter.—Although S. 317 of Act XIV of 1882 should be construed strictly, the words of the section ought to be given effect to if they apply aptly to the plaint.

S. 317 applies to suits against a purchaser's representatives and assigns.

After the Transfer of Property Act, no waiver or transfer of rights can be recognised in the case of an immoveable property in the absence of a registered instrument. *Mannappa* v. *Surappa* I. L. R. 11 M. 234 held inapplicable.

Estoppel by itself cannot form the basis of a cause of action, but can be used as a bar to the defendant's plea in answer to the cause of action otherwise alleged and proved.

Kandasami Pillai v. *Rangasami Nainar* 301

Estoppel *See Evidence Act* 335

Evidence Act Ss. 107 and 108,—*Scope of—Presumption in law and in fact—Adverse possession—Tacking on of possession.*

There is no presumption in law that a man was alive until the expiration of seven years from the date he was last heard of. Ss. 107 and 108 of the Evidence Act deal with the procedure to be followed when a question is raised before a court as to whether a person is alive or dead. Neither of the sections lay down any presumption as to how long a man was alive or at what time he died.

Naiki v. *Lalsahu* I. L. R. 37 C. 103 *Muhammad Sheriff* v. *Banda Ali* I. L. R. 34 A. 36 referred to.

It depends upon the circumstances of each case whether a Court would or would not make the presumption that a person last heard of within seven years is alive, even assuming that a court may make such presumption.

A person who has been found to have no title cannot, rely on the possession of another when the former has not entered in possession as the latter's heir.

Veeramma v. *Chinna Reddy* 443

Evidence Act—*(Contd.)* PAGE.

————**S. 114**—*Presumption—Plea of discharge—Bond with defendant—Suspicion—Question of onus after parties go into evidence.*

In a suit on a bond the production by the defendant of the bond with the endorsement of payments casts on the plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding *i. e.* of showing that the bond came in defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or unauthorised.

Suspicion though a ground for scrutiny cannot be made the foundation of a decision.

Quære: Whether any question of onus remains after the parties go into evidence.

Choudhri Medhi Hasan v. *Sri Mandir Das* (P. C.) 741

————**S. 115**, *not exhaustive—Estoppel—Blowing hot and cold.*

S. 115 of the Evidence Act is not exhaustive. A defendant who obtains judgment upon an allegation that a particular obstacle exists to the plaintiff's suit cannot in a subsequent suit based upon such allegation deny the truth of his former allegation.

Where the defendant in resisting an application against him stated that he did not deny his liability and he was willing to pay the plaintiff his dues, but objected to the relief being granted to the plaintiff in that particular application, cannot afterwards turn round and plead in a suit brought for the purpose that long before the date of the plea in the prior proceeding the suit had become barred by limitation.

Krishnasawmy Chetty v. *Sitaram Chetty* 335

Execution Sale—*Interest taken by the purchasers—Tests for determining—Impartible estate—Saw in Madras in 1869—Execution Sale in 1869—Hindu Law—Alienation by Co-parcener—Suit by son and Co-parcener—Difference—Onus—Civil Procedure Code (XIV of 1882) S. 373—Applicability—Second suit on different Cause of action—Right of suit—speci Successones.*

In determining the interest which a purchaser in an execution sale takes the following circumstances; namely the character of the debt, the terms of the sale certificate which formed the contract of the parties, the law as interpreted at the time of the sale, the frame of the suit, the judgment and decree, the execution proceedings, the advertisement for sale, the adequacy or indequacy of the purchase money are all circumstances which may legitimately be considered in the enquiry and no single circumstance can be regarded as conclusive by itself.

Held, also on the question of the interest taken by a purchaser in execution sale of a decree against the holder of an impartible Zemindari in Madras in 1869 for debts (not immoral or illegal), that the purchaser took the whole Zemindary and not merely the life interert. The law in Madras in 1869 was that the holder of an impartiable Zemindary was not possessed of absolute powers of disposition over the corpus, but, apart from the necessity of conforming to the requirements of any special regulation such as Regulation XXV of 1802, he was like any other head of a co-parcenary, competent to bind the estate by debts incurred or alienations made for purposes which are regarded by the Mitakshara law as proper and justifiable.

Execution Sale—*(Contd.)* PAGE.

The difference between the case of a son attacking a sale by the father and that of a co-parcener attacking a sale by the manager is essentially one of onus. In the case of the son the burden is on him of showing that the debt was incurred for illegal or immoral purposes while in the case of other co-parceners the creditor has to prove that the debt was incurred for proper or necessary purposes.

S. 373 C. P. C. (1882) cannot be a bar to a fresh suit based on a different cause of action.

Quaere:—Whether a person having a mere chance of succession to an estate can maintain a suit for declaration that the interest purchased by the defendant in an execution sale was barely the life interest of the then holder of the estate?

Arulappa Naicker v. *Murugappa Chettiar* 658

————*Purchaser's right—Sale certificate—construction of—area—Boundaries and name—Determining factor.*

The mere drawing up of a sale certificate to be given to a purchaser in court sale is not a judicial order binding on any party; though an order passed on adjudication on this question as to what the sale certificate should contain will be a judicial order.

Under cl, 31 of the agency rules, a petition lies to Goverment to revive orders passed by the Agent in execution proceedings.

When two descriptions of the subject matter of a grant *i. e.* the boundaries and area, conflict with each other and when there are two conflicting parts of the same description, that which is the more certain, stable and the least likely to have been mistaken or inserted inadvertently must prevail, if it sufficiently identifies the subject matter. This is not a rule of law and hence inflexible in its character. But it is a mere rule of construction which serves as a safe and universal infallible guide in determining the intention of the parties which is the touchstone of interpretations.

Held that in the particular case before their Lordships where the question was whether the property sold in execution included the hamlets or not the determining factor was the name of village and that the property sold included the hamlets.

It is unsafe and inexpedient for the executing court in a case where there can be no possible doubt to leave the question as to what was intended to be sold unsettled, when it is sure to be made an occasion for future disputes.

Zemindar of Pachipenta v. *Maharaja of Jeypore*.. 97

Executor, *powers of, before obtaining probate—Bona fide purchaser's rights.*

An executor has power to sell the estate for the purposes of administration without obtaining probate, and the purchaser in the absence of any allegation that he is not a *bona fide* purchaser having knowledge that the sale was not made in due course of administration gets a good title.

Ganapathy Aiyar v. *Sivamalai* 306

Grant—*Construction—Evidence contemporanea expositio—Inam— Saranjan—Impartibility—Jaghir—Incident of grant in.*

Contemporanea expositio as a guide to the interpretation of documents is often accompanied with danger and great care must be taken in its application. When the admitted ambiguity in a grant covers the geographical and pecuniary extent it is legitimate to a court to observe the footing upon which the grantors, namely, the Government and its successors and officials from the date of the grant had for a long time proceeded.

Grant—(*Contd.*) PAGE.

A grant in Jaghir of the ordinary character is no grant of the soil but a personal grant only of the revenue. It is personal and not hereditary and is resumable at pleasure and "necessarily, impartible" and a custom of succession by a primogeniture would be radically inconsistent with the personal and non-transmissive character of a grant in Jaghir and consequently not subject of proof.

The words saranjan and inam are not mutually exclusive. The term "inam is one of more generic significance applicable to a Government grant as a whole.

The question in the case was about the significance of the words "lands attached to Deur" a term used in a grant and as to whether they included the lands belonging to the grantee in the Satara District yielding an annual income of Rs. 3,000 or whether it covered all the properties in the Bombay Presidency yielding a revenue of Rs. 12,000 per year.

Raghoji Rao v. *Lakshman Rao Sahib* (P. C.) 383

————*Construction*—"*Poramboke*"—*Channels whether included in grant.*

The effect of the insertion of the words "Besides Poramboke" in a grant must depend on the evidence available in each case and the circumstances attending the grant.

Held also that by the particular grant before their Lordships all kinds of poramboke were intended to be included in the grant including channels etc.

Secretary of State v. *Kannepalli Venkataratnammah.* 109

Guardian and ward—See Hindu Law 638

——————See Mahomedan Law 6

Hindu Law—*Adoption*—*Dancing girls of*—*Validity*—*Dancing girl, who is?*

A family woman cannot be a dancing girl: and an adoption by a family Hindu woman of a girl is invalid.

Quære:—Whether an adoption by a dancing girl is invalid?

Per *Sadasiva Aiyar* J.:—An adoption of a minor girl by a prostitute belonging to a caste which ultimately follows prostitution as a profession is a criminal act under the Penal Code and is illegal. *Vengu* v. *Mahalinga* I. L. R. 11 M. 393, dissented from. *Mathura Naicken* v. *Esu Naicken* I. L. R. 4. B. 545 approved. Dictum in *Ghasti* v. *Umru Jan* I. L. R. 21 C.149 at 159 referred to.

Guddati Reddi Obala v. *Ganapati Kandanna.* 493

2.————*Adoption*—*Orphan*—*Invalid adoption*—*Effect*—*Estoppel*—*Essentials*—*Conversion of suit for ejectment into one for partition.*

An orphan cannot be adopted under the Hindu Law.

An invalid adoption does not *per se* destroy the adoptee's rights in his natural family.

No estoppel can arise in the absence of any allegation that the conduct of the other party induced the person who sets up the plea to alter his position to his disadvantage.

A suit in ejectment cannot be converted into a suit for partition.

Vaithilinga Mudali v. *Natesa Mudali*.. 189

3.————*Alienation See Daughter's estate* 223

4.————*Authority to adopt*—*Construction*—*Successive adoptions*—*Estoppel of widow.*

Hindu Law—(*Contd.*) PAGE.

Where a widow has asserted in the most solemn manner under her hand and seal her authority from the husband to make an adoption, she cannot be allowed to change her story when grave injustice will ensue to those who have acted in reliance upon her deliberate and repeated representations.

Held also on the question of the extent of the authority in the case that the authority was in favour of the general authority to make successive adoptions on the death of the preceding adopted son.

Held also that the estoppel of the widow would only be personal to her and bind others.

Rani Dharam Kunwar v. *Balwant Singh* (P. C.) 200

5.————*Daughter's estate—Alienation for maintenance—"Necessity"—Maintenance of destitute widowed daughter a legal obligation on family of birth—Chastity how far a qualification and a bar for female's inheritance.*

A Hindu daughter has not less power in reference to the estate she inherits from her father than a Hindu widow would have in the estate inherited by her from her husband and an alienation made by the daughter for purposes of her maintenance is binding on the reversion.

Per *Sadasiva Aiyar*, J.—*Obiter* :—There is a legal obligation on a Hindu father and his family to support a destitute daughter of the family even though married if she could not get sufficient provision from her deceased husband's family or her maintenance.

Bai Mangala v. *Bai Rukmani* I. L. R. 23 B. 291 dissented from.

The words "necessity" and "legal necessity" and their meaning dwelt on.

Chastity as a qualification for inheritance in the case of several Hindu female heirs considered.

The Smriti Law and the present state of Hindu Law in regard to the position of women and their legal rights considered.

Venkatrazu v. *Kotayya* 223

6.————*Guardian and Ward—Natural guardian—Powers of—Alienation—Necessity—Pressure—Test—Discretion of guardian—Payment of debts binding on the estate—Sale and Mortgage—No difference—Costs—Practice—Difficult questions of law involved.*

Per Sundara Aiyar J:—The duties of a natural guardian of a minor in the Hindu Law must be regulated by considerations of what should be regarded as best for the interests of the minor.

The discretion as to how the duty of discharging the debts binding on the minor should be performed rests on the guardian. The question in each case would be whether that discretion has been properly exercised. Consultation of proper advisers is a test though not conclusive on the Court if in its opinion the Court be convinced that both those consulted and the guardian made a great mistake. The right view is to consider whether in the circumstances that existed at the time of alienation the act would be regarded as a prudent one by men of ordinary prudence in dealing with the property of a ward. To constitute pressure or necessity, it is not necessary that there should be a demand by the creditor. Considerable latitude should be allowed to the guardian in the exercise of its discretion.

The positions of the natural guardian in Hindu Law, a trustee and a manager of a joint Hindu family compared and contrasted.

Hindu Law—(*Contd.*) **PAGE.**

There is no difference between a sale and a mortgage in the applicability of the tests above referred to.

Per *Sadasiva Aiyar* J :—The only safe and convenient rule is that if the guardian of a Hindu minor alienates the minor's property because he considers it after weighing all the then existing circumstances to be in the best interests of the minor to make that alienation the minor is clearly bound by the act of alienation; and that even if the guardian acted wrongly the alienee is protected if he acts in good faith after making due inquiry and if he is satisfied on the representations of the guardian and on his own independent inquiry that the guardian's acts appeared then to be clearly for the minor's benefit. Comparison between the powers of a natural guardian and those of a statutory guardian is of very little utility in deciding the powers of a natural guardian in Hindu Law.

Per curiam:—The fact that questions of law raised in the case were not easy of solution is not a good ground for disallowing the costs of a successful litigant.

Vembu Iyer v. *Srinivasa Iyenger* 638

7.————*Impartible Estate—Nature and incidents of ownership—Maintenance of member removed more than three degrees from common ancestor—Co-parcenary, limits of—Manu Chap IX. Ss. 186 and 187—Adopted son, status of—in relation to collaterals removed beyond three degrees.*

An impartible estate retains the character of joint property for purposes of succession as well as for claims of maintenance of those members of the family to whom it belongs for purposes of succession; and claims to maintenance should depend on the question whether if the estate were partbie the person claiming maintenance would be entitled to maintain a suit for partition. *Sartaj Kuari* v. *Deoraj Kuari* I.L.R. 10 A. 272 and cases following it explained and distinguished.

Impartible estates and the character and incidents of the ownership of the holder therein considered in detail.

A Hindu who is removed more than 3 degrees from the common ancestor is entitled, at any rate when there is no gap of 3 generations in any line of the co-parcenary, to take the family estate by survivorship on the extinction of the members of another branch descended from the common ancestor; and consequently he is entitled to a partition of the same; and if the estate is impartible, to maintenance from the holder of the impartible estate, though the latter is removed by more than 3 generations from the common ancestor of the claimant.

The rule is the same whether the claimant for maintenance is the natural son or an adopted son of his father.

An adopted son takes the place of the natural son for purposes of relationship and inheritance. S. 3 of the Dattaka Chandrika relates only to the performance of funeral rites by the adopted son and no more.

The limits of co-parcenary in the Mitakshara as stated in Manu Ch. IX Ss. 186 and 187 and the texts of Katyayana and Devala considered and criticised.

Thirumal Rau Saheb v. *Rangadani Rao Saheb* 79

8.————*Impartible Estate—Succession—Compromise between owner and reversioner—Construction.*

The owner of an impartible estate for the time being can make a will and put an end to the impartibility of the estate.

But where after the last holder's death, a will was set up by the widow and a suit was instituted by the reversioner contesting the genuineness of the will and an agreement was entered into by the parties which provided *inter alia* that the

Hindu Law—(*Contd.*) PAGE.

widow was to have an interest for her life in the estate subject to certain conditions and that the reversioner or his successor should be the absolute owner of the estate and should occupy the *gaddi* and the will was subsequently admitted to probate in a suit by the reversioner's widow claiming proprietary possession of the estate against her husband's distant cousin in the male line and certain other member of his family —

Held that the rights of the other parties to the suit depended upon the construction of the compromise and not upon the will and that the impartible character of the estate was not changed by the terms of the compromise.

Thakurain Lekhraj Kunwar v. *Thakur Harpal Singh* (P. C.) .. 1

9.————*Joint family—Alienation—Marriage expenses of a male co-parcener in twice born castes.*

Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi; and debts reasonably incurred for the marriage of a twice born Hindu male co-parcener are binding on the joint family properties.

Kameswara Sastri v. *Veeracharlu* I. L. R. 34 M. 422 approved.

Bangaraya v. *Venkatanarasa Raju* 288

10 ————*Joint family—Debts of father—Son's pious obligation—Word "Avyavaharika."*

Sons of a Hindu father are under a pious obligation to discharge decree debts against the father personally, incurred in connection with litigation as a Devastanam Committee member.

Ghakowri Mahton v. *Ganta Pershad*, 32 B. 348 dissented from.

Dharbar Khachar v. *Khachar Harrur*, 15 C. L. J. 228 followed.

Ramayyengar v. *Secretary of State*, 20 M. L. J. 89 distinguished.

Per *Sadasiva Aiyar* J.—The term "Avyavaharika" explained. "*Avyavaharika*" means a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a court of justice.

Venugopal Naidu v. *Ramanadhan Chetty* 61

11.————*Joint family—Co-parcener of family property, sale by—Consideration only partly binding on both—Decree—form of.*

In the absence of anything appearing to the contrary, the consideration for a sale must be distributed over the whole of the property sold in proportion to the value of each part.

Where one of two co-parceners of a Hindu joint family sells property belonging to both and half the consideration only is found binding on the family. *Held* in a suit by the other co-parcener for recovery of his half share from the vendee, that he would be entitled to recover the same only on payment of his share *i.e.* half, of that portion of the purchase money which went towards discharging debts binding on both.

Marappa Gounden v. *Rangasami Gounden* I.L.R. 23 M. 89 dissentd from.

Vadivalam Pillai v. *Natesam Pillai* 256

12.————*Joint family—Contract for sale of land—Specific performance against minor member's interest—Damages—Specific Relief Act S. 19.*

An assent to a contract for sale of lands by a deceased co-parcener before his death cannot affect the surviving co-parcener.

Hindu Law—(*Contd.*) PAGE.

A person with whom a contract for sale of family lands was entered into by only one of several co-parceners of a joint Hindu family and which could not be specifically enforced is entitled to damages against the contracting co-parcener under S. 19, Specific Relief Act.

Obiter, A managing member has power in proper circumstances to bind the minor's interest by contract for sale of family immoveable property; and specific performance can be decreed against that interest.

Krishna Aiyar v. *Shamanna* 610

13.———*Joint family—Mortgage by the elder of two brothers as absolute owner and in his own behalf for discharging father's debts—effect—minority.*

A mortgage by the elder of two brothers, members of a joint Hindu family, not in any respect as representing the younger brother of a joint Hindu family, but in his assumed position as the absolute owner of the estate is void and of no effect on the younger brother who was a minor at the time even though the mortgage was executed by the elder for the purpose of discharging debts incurred by their father; and the mortgage executed as it was by the elder only even though the younger was made a party thereto merely to make known his consent and approval to the loan being taken must be regarded as a mortgage deed to which the younger was not even an assenting party and one which did not affect him or his interest in the estate.

Balwant Singh v. *Maharaj Singh.* (P. C.) 18

14.———*Joint family—Partition—Partial Partition by alienee from co-sharer.*

In a suit for partial partition *i.e.*, for partition of an item of property by the transferee from a co-parcener of a joint Hindu family, the defendants are not entitled to ask that the suit should be dismissed on the mere ground that the suit does not comprise all the family properties and they can only claim either that there should be general partition among all the members of the family or that before the plaintiff is allowed the share in specific property purchased by him the equities as between the co-parceners should be taken into account and adjusted; but where on the pleadings or the facts found there are no equities which the other members have against the purchaser of the right of one of the members which can only be worked out in a general suit for partition, the suit for partial partition will lie. *Harikrishna Chowdhury* v. *Lakshimi Narayan Puntulu* 20 M. L. J. 323 referred to.

On an alienation of the share of a co-parcener in one out of several items of properties, the joint tenancy of all the members, including the one whose right in the particular property is transferred to a third person, with respect to the other properties in the family is not affected by the alienation. The members of the family preserve their undivided status and they also continue to remain joint tenants with respect to all properties except that with respect to which the right of one of them passed to a stranger; with regard to the property affected by the transfer the alienee is a tenant in common with the members of the family other than the alienee, these other members being still joint tenants amongst themselves with respect to their own shares.

The transferee acquires the share of the transferor at the time of the transfer, but subject to the important qualification that the right obtained is subject to all the equities available to the other members of the family against the transfer. The different view entertained in the earlier decisions explained and declared no longer law.

Hindu Law—(*Contd.*) PAGE.

The rule against partial partition is not a rule of Hindu law but owes its existence to judiciary law ; elsewhere in India co-tenancy and joint tenancy are the result of contract and the rule against partial partition will hold good there. But in the case of a joint Hindu family the tenure is not the result of any agreement ; and the right to insist on a partition does not stand on the same footing as it might in cases of co-tenancy arising from contracts.

Subba Rao v. *Ananthanarayana Aiyar* 64

15.————*Reversioner's suit to set aside adoption—Suit by mother against widow—Death of plaintiff's mother—Abatement—Legal representative—Reversioners not.*

A suit by the mother of the last male owner to set aside an adoption by the widow abates on the mother's death.

The cause of action in a suit by a reversioner does not survive on his death to another reversioner and there is no distinction in this matter between a suit to set aside an adoption and a suit to set aside an alienation: *Chiruvolu Ponnamma* v. *Chiruvolu Perraju* I. L. R. 29 M. 390 distinguished.

The reversioners of the last male owner are not the legal representatives of the mother of the last owner who brought a suit to set aside an adoption and subsequently died.

" Devolves " in S. 211 C. P. C. means has devolved.

Arunachalam v. *Vellaya* 719

16.————*Stridhan—Succession—Step mother and maternal aunt.*

A step mother succeeds to a maiden's stridhan in preference to the deceased maiden's maternal aunt.

Kamala Bhai v. *Bhaghirathi Bhai* 518

17.————*" Woman's Estate "—Stridhan—Creation by contract or grant—Accretions, nature of.*

A woman's estate can be created by contract or by grant and not merely by inheritance. A Hindu female is capable of possessing two kinds of estate passing by different rules of inheritance, namely, a woman's estate with respect to which she does not become a stock of descent and which passes after her death to her husband's heirs; and (2) an absolute estate which passes to her own heirs.

Where the husband's brother of a Hindu widow gave half of the property to his brother's widow, *held* that in the circumstances a woman's estate was created in the properties.

Quaere :—Whether a mere stranger can give property to a Hindu widow with the incidents of a widow's estate descendible to her husband's heirs ?

There is no presumption, especially in the absense of even an allegation in the plaint, that immoveable properties purchased by a Hindu woman out of the income of a woman's estate in her hands are incorporated with the parent estate and with the latter will descend to her husband's heirs.

Meda Vengamma v. *Mitta Chelamayya* 168

18.————*Widow—Alienation with consent of reversioner for consideration or no consideration—Partial and total alienation—Future and past alienation—Consent and ratification—Relinquishment by reversioner—Alienation by widow.*

Hindu Law—(*Contd.*) PAGE.

A reversioner may be estopped by his consent, given for consideration from contesting a Hindu widow's future alienations. *Rangappa Naik* v. *Kamti Naik* I. L. R. 31 M. 366 followed.

Held:—Per *Sundara Aiyar* J. that the reversioner in the case was estopped from contesting a gift by a widow to her adopted son. whose adoption was found invalid in a prior litigation by the reversioner, by reason of a relinquishment deed he executed to the widow prior to the date of the gift in which he gave the widow power to dispose of the property by means of gift or sale : and that it did not matter that the term of the deed of relinquishment itself did not show that any alienations were contemplated.

Per *Sadasiva Aiyar* J. (*Sundara Aiyar* J. inclining to the same view.) There is no distinction in the applicability of the rule of estoppel to a reversioner in respect of alienations by a Hindu widow made with his consent with reference to alienations for consideration and alienations for no consideration. *Kuppier* alias *Venkatasubbier* v. *Kotta Chinnasami Iyer* M. W. N. 758 followed.

2. Per *Sadasiva Aiyar* J :—Nor is there any warrant for any distinction between alienation of part and alienation of the whole estate : *Rangappa Naik* v. *Kamti Naik* I. L. R. 31 M. 366. *Walli's* J's. dictum approved.

3. Consent to future alienations stands on the same footing as ratification of past alienations.

4. There is no distinction between an alienation by the widow to third persons with the reversioner's consent and a relinquishment by the reversioner to the widow herself thereby conferring on her an absolute estate.

Raghupathy v. *Kannamma*.. 363

19.————*Widows—Co-widows—Right to partition putting an end to right of survivorship—Right of suit—Family settlement—Beneficiary— Third party—Right of Suit—Deed—Partition—Construction.*

Two Hindu co-widows may make a partition of their husband's estate so as to deprive either of them of the right to succeed by survivorship to the property allotted to the other.

A third party in whose favour a provision is made in a family settlement in the nature of a partition can claim the benefit of the provision made in her favour.

Held on the construction of the deed of partition between two Hindu co-widows in the case that one of the widows and her daughter took some properties allotted to them as against the right of survivorship of the other widow.

Sudalai Ammal v. *Gomathi Ammal* 355

20.————*Will—Construction—'Heir'*

A will ran as follows "After my demise my wife legatee No. 1 will remain in possession of the property with all sorts of powers like myself, and after the death of my wife, my daughter in-law legatee No. 2, will remain in possession and occupation of the property just like myself and legatee No. 1 and thereafter (*i.e.*, after the daughter-in-law's death) she will have power to nominate any one whom she thinks fit as an heir."

Held on the construction of the will that the word "heir" meant heir to the testator and that the daughter-in-law did not take an absolute estate in the property devised.

Brij Lal v. Subraj Bikram Singh (P. C.) 38

PAGE.

Insolvency Act—(Presidency) S. 73—*Computation of time for Appeal—Money held in trust—Money held in fixed deposit in insolvent's own name though paid for the security of an employee.*

In computing the period of limitation under S. 73 of the Indian Insolvency Act, if the last day of limitation for filing the appeal falls on a holiday for the Court, the time during which the court was closed should be computed in favour of the appellant; and consequently, an appeal filed on the re-opening day is in time.

Held also that the amount paid in by the employee of the Insolvent Company and held in fixed deposit by the latter in their own name was not money held *in trust.*

Messrs. Arbuthnot & Co. v. *Sabapathy Mudaliar.* 212

Jurisdiction, *inherent—Order for personal appearance—Next friend's disobedience—Minor—Practice—Procedure.*

A Court has jurisdiction, to direct the personal appearance of parties at any stage of the case even in the absence of specific provisions in the Code; but a Court has no power to visit the disobedience of a next friend of a minor plaintiff to the court's order to appear, on the minor himself, and to dismiss the suit on that account.

A next friend of a minor plaintiff is a "party" to the suit only in a limited sense of the term.

Anni Ammal v. *Muthukumara Chettiar.* 676

Jurisdiction *of High Court—Writ of certiorari—Cr. Pr. C. S. 476—"Divisional Officer deciding income-tax appeal"—Court—No Revision to Board of Revenue—Letters Patent Cl. 8—Effect—Object of—Order under S. 476 Cr. P. C. passed after the enunciation of proceedings—Legality—Interference in revision.*

A Divisional Officer acting under the Income-Tax Act as an appellate tribunal is not a Criminal Court; and the High Court has no power to revise the proceedings of the Divisional Officer under S. 435 Cr. P. C.

A Divisional Officer is a Court in hearing appeals under the Income-Tax Act. No revision petition lies to the Board of Revenue in respect of an order for prosecution passed by the Divisional Officer under S. 476 Cr. P. C. in connection with an income-tax appeal before him.

Per *Sundara Aiyar* J.—In passing an order under S. 476 Cr. P. C. long after the proceedings, the Divisional Officer, even assuming that he was bound to pass the order at a particular time as indicated in *Aiyakannu Pillai* v. *Emperor* I. L. R 32 M. 49, could not be said to have passed it without jurisdiction and the High Court is not bound to interfere and quash proceedings on *certiorari* even in cases where the defect can be said to be one of jurisdiction.

Per *Sundara Aiyar* J. (*Sadasiva Aiyar* J. dissenting)—The High Court has no jurisdiction to issue a writ of certiorari on an officer beyond the limits of its Original Jurisdiction.

Per *Sadasiva Aiyar* J.—The power to issue the writ of *certiorari* to quash judicial proceedings passed by persons in the moffussal rests in the High Court. *In the matter of Amir Khan* 6 B. L. R, 392. followed.

Meaning of the word "Court" dwelt on.

The powers of the High Court with regard to the writs of *Habeas Corpus* and *Certiorari* are the same.

Jurisdiction—(*Contd.*) PAGE.

Nothing shall be intended to be beyond the jurisdiction of the superior Courts unless expressly taken out of it. Object of Cl. 8 of the Letters Patent and its effect considered.

Per *Sundara Aiyar* J.— Cl. 8 of the Letters Patent does not widen the jurisdiction given to the Court in Civil and Criminal matters by Cl. 21, 22 and 23.

Nataraja Iyer. (In re) 393

———*High Court—Restoration of Criminal Revision dismissed for default.*

The High Court is not competent to restore to its file a criminal revision petition dismissed for default.

Obiter :—In the case of a criminal appeal dismissed for default of appearance of the pleader, the High Court may restore it under S. 421 Cr. P. C.

Ranga Rao In re 371

Jurisdiction of Civil Courts—*Suit for refund of land revenue—Crown's prerogative—Land revenue nature of—*

A Suit for refund of land revenue on the ground of Government's failure to supply water is not maintainable by Civil Courts.

Land Revenue is a tax imposed on lands by virtue of the prerogative of the State; and civil courts have no jurisdiction to try any question relating to it. The liability to pay land revenue does not rest on contract or on any relation resembling contract.

Secretary of State for India v. *Venkata Pathi Raju* 746

Land Acquisition Case—*Award of High Court—Appeal to the Privy Council not maintainable—Right to appeal a statutory right.*

A right of appeal must be given by express enactment.

There is no appeal to the King-in-Council from the decision of the High Court in a Land Acquisition case.

Botataung Company Limited v. *The Collector of Rangoon* 276

Landlord and tenant—*Lease, assignment and rent—Liability for—Apportionment—Privity of estate.*

An assignee of a lease from the lessee can claim as against the lessor an apportionment of rent accruing due after the date of his assignment according to the period before and after the assignment and the rent can be deemed as accruing from day to day as between him and the lessor.

Privity of estate is the ground of the assignee's liability and there is no reason why it should be made heavier than the extent of his privity would justify.

Randipurazil Kunhisow v. *Molloli Chathu* 695

———*Non-payment of rent—Relief against forfeiture—Plea of payment not proved—Lease prior to 1882.*

In the case of leases before the Transfer of Property Act, it is not necessary that in order to work out a forfeiture the landlord should prove that he intended to avail himself of the forfeiture by some act of his.

The question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of each case.

The fact that the tenant set up a plea of payment of rent and failed to prove, does not necessarily, in itself, disentitle him to equitable relief against the forfeiture.

Ramakrishna v. *Baburaya* 715

Landlord and tenant—(*Contd.*) PAGE.

———*Co-sharers—Suit for proportionate rent—Contract to pay proportionate rent—Legality.*

A joint owner is not entitled to sue for proportionate rent. But if parties agree to accept and pay proportionate rent according to shares, there is nothing illegal in it, though it is a question whether stranger co-sharers will be bound by the agreement between other sharers and the tenants.

Srinivasa Varadachariar v. *Sami Reddy* 161

———*Enhancement of rent—Absence of evidence to show payment of lower rate at any time.*

Where there is no evidence in the case to show that any lower rate than the one claimed was ever at any time paid, it is impossible to treat the rent demanded as a case of enhancement.

Zamindar of Chittedu v. *Narayanappa Naidu* 59

———*Rent suit—Plea of Partial eviction—English and Indian law—T. P. A. S. 108 cl. (c)—Construction.*

Sec. 108 cl. (c) of the Transfer of Property Act does not make actual prior payment of rent a condition for the right to enjoy the holding without interruption.

Both under the English law and Indian Law non-delivery of possession of the premises is a good answer to a suit for rent. Actual or constructive eviction of the tenant from the entire holding is a good plea in answer to a suit for rent by the landlord; but partial eviction (*i.e.* eviction from part of the holding) is no answer to a suit for rent to the extent or the portion in the enjoyment of the tenant. The tenant may on partial eviction repudiate the whole lease, but if he does not and remains in possession of a portion, he is estopped from pleading non-liability for the rent of the portion in his occupation. He will be liable to pay tent but entitled to damages in respect of the eviction and he can set off the damages as against the rent in the landlord's action for rent.

If clause (c) of S. 108 T. P. A. is to be read as importing a condition at all of prior payment of rent, it can only be so read in cases where the lessee claims actually to enforce his right to damages for breach of the covenant for quiet enjoyment.

Meenakshi Sundara Nachiar v. *Chidambaram Chetty* 119

Land Tenure—"*Savaram lands*"*—Meaning of—Madras Estates Land Act S. 185—Leases before July 1898 and after July 1898—Admissibility in evidence—Judge's knowledge—Extent of user in decision of case.*

Per *Sundara Aiyar* J:—The words "savaram lands" do not necessarily import the absence of kudivaram right in the cultivating ryot *i.e.*, the idea of full proprietary right in the Zamindar.

Under S. 185 of the Estates Land Act, leases *executed* before 1st July 1898 can be taken into consideration in coming to a conclusion as to whether certain lands formed part of the Zamindar's private land or not. It is the date of the contract and the period of the lease which determines the admissibility. Leases executed after 1st July 1898 are inadmissible in evidence to prove the character of the land except to prove that lands leased before July 1898 by the Zemindar were treated in the same manner after that date.

A judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise ; but he may use and cannot

Land Tenure—(*Contd.*) PAGE.

help using his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in the case.

Per *Sadasiva Aiyar* J.—The word "Savaram" when applied to lands indicate usually that the land itself, both Melwaram and Kudivaram, belongs to the Zemindar free from any obligation to pay revenue to Government on the extent of such land. The Court *may* presume that Savaram land is the private land of the Zemindar, but it cannot be laid down that the courts *shall* always make the presumption.

Under S. 185 of the Madras Estates Land Act leases granted before 1st July 1898 are admissible in proof of the character of the land, even though the period of lease be subsequent to 1st July 1898 : and leases after 1st July 1898 are totally inadmissible, *i. e.*, not admissible even to show that a land was treated in the same manner after July 1898 as before July 1898.

The only restriction which can be imposed upon a Judge in the matter of using his personal knowledge in the decision of a case is that he should not import knowledge obtained by mere rumour or hearsay of concrete facts connected with the particular case before him for arriving at a conclusion.

The limits as to the use by the Judge of particular facts known to him in connection with the case before him and the restrictions under which he may use his knowledge in the decision of the case discussed.

Lakshmayya v. *Rajah Varadaraja Appa Row.* 624

———*Right to Minerals—Suit by Zamindars for Mineral rights—Government not necessary party.*

The Digwars in Manbhum have unlike the Ghatwals of Sarlet no right to the underlying minerals in their land and Government is not a necessary party to a suit by the Zamindar to establish his right to minerals. The Digwari tenure is similar to Ghatwali tenure It was granted originally in consideration of the performance of military service, to which police duties were attached. The tenure is hereditary and inalienable. The Digwar is appointed by the Government and liable to be dismissed by it for misconduct. On dismissal the next male heir, if fit for the office, is appointed.

Raja Sri Durga Prasad Singh v. *Braja Nath Singh* (*P. C.*) .. 26

Legal Practitioners' Act S. 13—*Professional Misconduct—Evidence Act, Ss. 11, 40, 41, 42—Judgment, in civil case—Relevancy and admissibility in enquiry—Failure to appeal—Assignment of actionable claim —Transfer of Property Act S. 136—Engaging in trade—Rules under the Legal Practitioners' Act, Rule 27.*

Per Curiam :—The judgment in a civil case between a client and his pleader touching the terms of the engagement of the pleader and his conduct of the case is relevant and admissible evidence in a subsequent enquiry against the pleader under S. 13 of the Legal Practitioners' Act; but it is not conclusive evidence against the pleader.

Failure to appear for a client who has engaged the pleader for a case is professional misconduct.

A pleader is guilty of professional misconduct in taking a transfer of an actionable claim in contravention of S. 136 of the Transfer of Property Act.

Failure to obtain the sanction of Court before a pleader engages in trade is in contravention of rule 27 of the rules framed under the Legal Practitioners' Act.

Legal Practitioners' Act—(*Contd.*) PAGE.

Per *Sankaran Nair* J.—A pleader by engaging in a trade cannot be said to act unprofessionally. The notion that no trade however honestly carried on is worthy of a vakil is a relic of the times that have passed away and its introduction in India should be a matter for regret. The advisability of any rule prohibiting pleaders from engaging themselves in trade doubted.

A Vakil is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid in the absence of any agreement to the contrary or at least notice to that effect to the client in sufficient time to enable him to make other arrangements.

Cases of misconduct in which the Court would exercise its disciplinary jurisdiction and cases where it would leave the client to his own remedy against the pleader indicated.

The onus is upon the pleader to show that his action in taking a transfer of an actionable claim did not amount to gross misconduct in the circumstance of the case before the Court.

Per *Sundara Aiyar* J.—The question as to whether and how far a pleader can engage himself in trade or business other than the profession, considered.

Quaere :—In the absence of an agreement to that effect, whether non-payment of a portion of the fee stipulated would absolve the pleader from his duty to appear for the client in the conduct of the client's case in court.

Munireddi, Marwadi Motiram v. *Venkata Rao* 447

Letters Patent Cl. 11 and 12—*Suit for land—Suit to avoid an incumbrance on land.*

A suit to avoid an incumbrance upon land is a suit for land within the meaning of S. 12 of the Letters Patent. The High Court in the exercise of its original jurisdiction is merely a local court and the general principle of construction applicable to an enactment conferring such a jurisdiction is that it must clearly appear that a case falls within the provisions of the enactment and jurisdiction cannot be extended by implication.

Official Assignee of Madras v. *Ramaswamy Iyengar* .. 726

Limitation—*Adverse possession—Mortgagor and mortgagee—Possession on agreement between parties that mortgagee is to hold possession as owner.*

It is open to both parties to a mortgage deed, the mortgagor and the mortgagee, to agree at any time that the mortgagee shall be in possession of the mortgaged property as owner thereof; and possession so held by the mortgagee for over twelve years will extinguish the mortgagor's title to redeem.

Umman Khan v. *Nagalla Dasanna* .. 360

Limitation Act—S. 31—"*Suit pending*" *Meaning of.*

Where a mortgagee's suit for foreclosure or sale was remitted by the Privy Council to be disposed of for further procedure and enquiry by the Court in India and that enquiry had not been entered upon at the date of the passing of Act IX of 1908, held that the suit was pending within the meaning of S. 31, Cl. 1 of Act IX of 1908.

Vasudeva Mudaliar v. *Sadagopa Mudaliar* P. C. .. 16

———**(1908) S. 31**—"*Mortgage*"—*Essentials.*

Formal transfer of interest and an express power of sale are not essential elements of a mortgage. A covenant to pay is an essential element of a simple mortgage. A charge created by act of parties, on specific immoveable property,

Limitation Act—(*Contd.*) PAGE.

for a debt and containing a covenant to pay is a mortgage within the meaning of S. 31, Limitation Act.

Rama Brahmam v. *Venkatanarasu Puntulu* .. 131

———**S. 10, Arts. 134, 142, 144**—"*Assignee for valuable consideration*"—*Religious Endowment—Permanent lease—Presumption of title as lessee—No presumption of tenancy from year to year.*

A lessee who holds the lands in consideration of an annual payment of rent is an assignee for valuable consideration within the meaning of S. 10 of the Limitation Act, even though no premium was paid at the commencement of the lease.

Arts. 142 and 144 of the Limitation Act are applicable to cases of prescription of limited interests as mortgagee or permanent lessee; *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram*, I. L. R. 23 M. 271 followed:

The trustee of a temple has no beneficial interest in the properties of the temple; and a permanent lessee of the temple properties prescribes title as lessee from the date of the invalid alienation and the prescription is perfected on the lapse of twelve years from the date of the alienation. *Abhiram Goswami* v. *Shymacharan Nandi*, I. L. R. 36 C. 1003. *Iswar Shymachand Jee* v. *Ram Kanai Ghose*, I. L. R. 28 C. 526 (P. C.) distinguished; *Damodar Das* v. *Lakhan Das*, I. L. R. 37 C. 885 referred to.

When a permanent lease has been found invalid, it is not open to courts to presume a tenancy from year to year from the payment of annual rent. *President and Governors of Magdalen Hospital* v. *Knotts*, 4 A. C. 335 commented on.

Narsaya Upada v. *Venkataramana Bhatta.* .. 260

———**art. 29, 36, 62, 120**—*Suit for compensation for wrongful attachment—Cause of action when arises?*

Per *Sundara Aiyar* J. (*Sadasia Aiyar* J. dissenting.) A suit for compensation for damages incurred by plaintiff by reason of his crops having been wrongfully attached and spoiled when they were under attachment through defendant's negligence is governed by art. 62 or 120; and the cause of action arises only from the date of the termination of the claim proceedings in plaintiff's favour.

Per *Sadasiva Aiyar* J:—Art. 29 or 36 is applicable to the case and, in either view, the cause of action arises on the date of the wrongful attachment.

Venkatramarayanier v. *Basayya.* 620

———**arts. 29, 62, 120**—"*Wrongful seizure*"—"*Moveable property*"—"*Legal Process*"—"*Compensation*"

Per *Sundara Aiyar* J. (*Sadasiva Aiyar* J. dissenting) Where a debt due to the judgment-debtor was attached and the amount was subsequently voluntarily paid into court by the debtor of the judgment-debtor and withdrawn by the attaching creditor, a suit by the assignee of the debt from the judgment-debtor for a refund is not governed by art. 29 of the Limitation Act, and whether governed either by art. 62 or by art. 120 would be within time if brought within three years from the date of the withdrawal of the amount by the judgment-creditor:

Meaning of the words "Seizure", "Moveable property" and "Compensation" dwelt on.

Yellammal v. *Ayyappa Naick.* 519

Limitation Act—(*Contd.*) PAGE.

———**Art. 30.**—*Suit against a carrier for compensation for loss of goods —Onus of proof of time—Notice of claim to Traffic manager—Compliance with Rules of company—Estoppel.*

The burden of proving in a suit governed by Art. 30 of the Limitation Act the time when the goods entrusted to a Railway Company were lost, is on the company.

Notice of the claim for compensation to the Traffic manager is good notice.

The modes of service prescribed by the Railways Act are not exhaustive. *Periannan Chetty* v. *South Indian Railway Co.*, I. L. R. 22 M. 157. followed.

If a mode of service is prescribed by the Rules of a Railway Company and the rule is complied with, it is not open to the company to plead that the compliance with the rules is insufficient in law.

Madras and Southern Mahratta Railway Co., Ltd. v. *Bhimappa.* .. 511

———**art. 39, 36**—"*Suit for compensation.*

Trespass does not consist only in the unlawful entry on another's land and a suit for damages sustained by plaintiff in defendant's unlawfully setting fire to and destroying plaintiff's vines on plaintiff's land is governed by art. 39 of the Limitation Act and not by art. 36.

Moideen Kutti v. *Koman Nair* 618

———*art, 85*—"*Mutual, open and current account*"—*Essentials of—Test.*

The essential feature of a "mutual, open and current account." is that there should be mutual demands; and it is not enough merely that the balances were constantly shifting in favour of one party or the other, though that would be an important factor in deciding the nature of the account.

Thuppathi Veera Chetty v. *Rangacharlu* 516

———**Art 96**—*Decree obtained by fraud*"—*Decree obtained by fraud if a nullity—Right of suit to set aside decree obtained by false testimony.*

A decree obtained by perjured testimony is one obtained by fraud within the meaning of Article 95 of the Limitation Act and a party to the decree cannot evade the operation of the article by professing to treat a prior decree of court in respect of the same relief a nullity on the ground of its having been obtained by fraud. *Mt. J. Koonwar* v. *B. Rup. Narain* 6 W. R. 165 distinguished.

Quaere:—Whether a suit to set aside a decree obtained by perjured testimony will lie. *Venkatappa Naik* v. *Subba Nask* questioned.

Kumarasawmi Chetty. v. *Kamakshi Ammal.* ... 187

———**Art 120, 10,**—*Prescription—Right of Ottidar in Malabar—Knowledge, if necessary for cause of action to arise.*

The right of an ottidar in the West Coast for pre-emption consists in a right to elect, where there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. Such a right can only be exercised when the ottidar knows first of all that the property is sold or attempted to be sold to another person and what the terms are on which it is so proposed to be sold.

Art. 120 is the article applicable to a suit to enforce the right of pre-emption by the ottidar when the ottidar himself is in possession and there is no registered deed as required by art. 10; and the cause of action arises only from the date of the ottidar's knowledge of sale.

"In what does the ottidar's right of pre-emption consist" considered.

Mamabai v. *Acharath Parakat* 607

Limitation Act—(*Contd.*) PAGE.

———**Art, 125**—*Hindu Law—Reversioner's suit to set aside alienation by Hindu widow—Cause of action.*

The cause of action for a reversioner to sue to set aside an alienation by a Hindu widow during her life time is distinct from the cause of action for another reversioner to bring a like suit and the fact that one is barred by the law of limitation from bringing a suit cannot be a bar to another reversioner against whom minority had the effect of extending the time for bringing a like suit, *Govinda Pillay* v. *Tayammal* I. L. R. 28 M. 57, *Bhagwanta* v. *Sukhi*, I. L. R. 22 A. 33, *Abinash Chunder Majumdar* v. *Hari Nath Saha*, 9 C. W. N. 25, followed, *Krishna Aiyar* v. *Lakshmammal*, 18 M. L. J. 275, distinguished, *Mallapudi Ratnam* v. *Mallapudi Raviah*, I. L. R. 25 M. 731, doubted.

Veerayya v. *Ganamma* 269

See **Madras Act III of 1905**

———**art, 182**—*Mortgage decree for sale—Execution—Date of final decree.*

Limitation for the execution of a mortgage decree for sale runs only from the date when the first decree or decree *nisi* for sale is made absolute.

Venkata Perumal Raju v. *Audikesavalu Reddi.* 57

———**Art. 182—Cl. 4**—*Step in aid of execution—Application in accordance with law—Transfer of decree for execution from District Court to Munsiff's Court—Attachment by Munsiff's Court—Application for sale to District Court whether application in accordance with.*

A decree may be executed simultaneously in more than one court; but the court that passed the decree should permit concurrent execution before it is so carried out: and in the absence of such permission, the court to which, the decree is transferred for execution is the proper court which is seized of the execution of the decree.

A District Court passed the decree in the case. The decree was transferred for execution to a District Munsif's Court subject to the control of the District Court which passed the decree and in the same district. The decree-holder got certain immoveable properties attached by the Munsif's Court in 1905. In 1907 a petition for sale, of the properties attached by the Munsif was made to the District Court; and the petition prayed for notice under S. 248 Civil Procedure Code (XIV of 1882) and nothing further was done. A subsequent petition was filed in 1910 for execution.

Held:—That though the petition of 1907 in so far as it prayed for notice was a step in aid of execution, yet it was not made to the proper court and consequently it could not give a fresh starting point for execution from its date within Art. 182 of the Limitation Act.

Maharaja of Bobbli v. *Raja Narasaraju* 236

Lunacy Act XXXV of 1858—*Malabar tarwad—Jurisdiction to appoint guardian for a lunatic Karnavan—Malabar Tarwad and Hindu joint family—Karnavan's right of ownership and possession and Malabar Law—Distinction between Tarwad and Hindu joint family as regards co-parcener's rights.*

No application will lie under the provisions of Act XXXV of 1858 to adjudicate a member of an undivided Malabar tarwad a lunatic even though the member be the Karnavan of the tarwad. The tarwad property is not the individual property of the karnavan and a manager appointed for a lunatic Karnavan will obtain no rights over the tarwad property.

Lunacy Act—(*Contd.*) PAGE.

Rights of a Karnavan of a tarwad over tarwad property defined, both as regards ownership and possession.

Distinction between a Mitakshara joint family in Hindu law and a Marumakkathayam tarwad as regards the rights of their component members pointed out.

If a Karnavan becomes a lunatic, the next senior member of the tarwad has the right to succeed to the management.

Per *Sadasiva Aiyar* J.—Blindness by itself is no disqualification for a karnavanship.

Govindan Nair v. *Narayanan Nair* 706

Madras Act III of 1895—S. 21—*Scope of—Pensions Act* S. *4—"Grant of land revenue"—Grants of land not to be split up into two grants of melvaram and Kudivaram—Madras Regulation VI of* 1831—*Jurisdiction of Revenue Court—Emolument of office.*

A grant of land cannot be split up into a grant of melvaram and a grant of kudivaran without words in the document to that effect. *Jeeyamba Bai* v. *Secretary of State* 23 M. L. J. 637 distinguished.

S. 21 of Madras Act III of 1895 cannot apply to a claim to recover what the plaintiff denies to be emoluments of an officer but which the defendant alleges to be such emoluments. *Kesiram Narasimhulu* v. *Narasimhulu Patnaidu* I. L. R. 30 M, 126. distinguished.

Revenue Courts have no jurisdiction to decide what were the emoluments of an office or to decree possession against a person alleged to be a trespasser.

Secretary of State for India v. *Subbarayudu* 721

Madras City Municipal Act III of 1904—S. 172—"*Shall ordinarily be resident in*"—*Constitution of the Board for revision of taxation.*

S. 172 of Act III of 1904 does not require that one of the commissioners hearing an application for revision of assessment should always be one who is resident in or representative of the division, in which the applicant resides or carries on business or in which the property assessed is situated.

Narayana Rao v. *President, Corporation of Madras* 591

——————**S. 176**—*Question of Law—Sch. V class III—"Dealers of every description."*

The question whether a money lender comes within the expression "dealers of every description" in class III of the schedule V to the City Municipal Act is a question of law within the meaning of S. 176 of the Madras City Municipal Act.

Swami Chetti v. *Corporation of Madras* 591

——————**S. 287**—"*Final*" *Meaning of—Suit for an injunction—Parties—Jurisdiction of Civil Courts—Standing Committee—Status and functions.*

Civil courts have jurisdiction to entertain a suit against the President of the Madras Corporation for an injunction restraining him from demolishing a building under S. 287 Cl. 2 of the Madras Municipal Act.

A suit for an injunction is the proper remedy in the case and the President who passed the order under the section is the proper party and not the Standing Committee.

Madras City Municipal Act—(*Contd.*) PAGE.

When a right and an infringement thereof are alleged the cause of action is disclosed; and unless there is a bar to the entertainment of such a suit the ordinary Civil Courts are bound to entertain the claim.

The Standing Committee of the Madras Corporation is not an independent body authorized to settle finally disputes between the tax payers or houseowners and the Corporation whose members they are and of which they form part; and they cannot be treated as a special tribunal constituted to decide claims between the house owners and the corporation under S. 287 of the Madras Municipal Act, so as to oust the jurisdiction of the ordinary Civil Courts.

The word "final" in S. 287 of the Madras Municipal Act refers to proceedings before the Corporation and is intended to bar an appeal from the Standing Committee to the general body of the Commissioners and not to shut out the jurisdiction of courts

Valli Ammal v. *Corporation of Madras* 531

Madras Act III of 1905— "*Aggrieved*"—*Limitation Act, Art. 149—Proof of possession—Presumption—Injunction.*

When possession for a certain period is shown it will be open to a court deciding the facts to presume that possession prior to that period was also in the party whose subsequent possession is proved. *Venkatrama Aiyar* v. *Secretary of State* I. L. R. 33 M. 362 referred to.

Where a party proves his possession for thirty years prior to suit the presumption to be drawn is that he had prescribed title by possession for sixty years unless it be proved on behalf of Government that the land was unoccupied land or land in the occupation of Government before.

A mere notice, by Government in exercise of its powers under Act III of 1905 (Madras) cannot be regarded as a proceeding under the Act by which a person can be "aggrieved" within the meaning of S. 14 of Act III of 1905.

Held also that it was not necessary to grant an injunction against Government and that it would be enough to declare plaintiff's title to the land in respect of which the injunction is sought for.

Narayana Pillai v. *Secretary of State* 162

Madras Estates Land Act, Ss, 11, 151—*Contract or usage to use holding for unagricultural purposes—Enforceability.*

In Madras Act I of 1908 a contract between a landlord and tenant or a usage which would entitle the tenant to use the holding in a manner which might impair the value of the land for agricultural purposes is not made inoperative.

Section 151 or section 11 has not the effect of making a contract or custom to the effect that tenant may use the holding for a tannery unenforceable against the landholder.

Mura Kasim Rowther v. *G. F. F. Foulkes* 352

———**Ss, 19, 3,(Cl. 2), 77, 189**—*Suit by landholder for rent due on Kamatam or private land—Forum—Jurisdiction of Civil Courts.*

A suit for rent due to a landholder in respect of his *Kamatam* or private land is cognizable by a Civil Court and not by the Collector's Court.

Sreeramulu v. *Rangayya Appa Row.* 241

Mahomedan Law—*Guardianship—Powers and liability of de facto guardian--Limitation Act, art. 44--Applicability to sales by de facto or unauthorized guardian—Art. 44 has no application to the sale by an unauthorised*

Mahomedan Law—(*Contd.*) PAGE.

guardian—Acting as guardian—Limitation Act art. 144—Sale by an unauthorised guardian to mortgagee—Suit by minor for redemption within twelve years after period allowed in mortgage deed.

According to Mohamedan law in the absence of duly appointed testamentary guardians in the case of a minor to whom property is given by another the care of the minor's property would devolve first on the minor's father and executor, next on the paternal grand-father and his executors and failing them the right of nomination of a guardian would "vest in the ruling power and its administraion."

A *de facto* guardian if not a *dejure* one may assume important responsibilities in relation to the minor's property, but cannot thereby clothe himself with legal power to sell it.

A person mortgaged his property in 1885 to the defendant with possession for a term of ten years. The mortgagor died in 1887 leaving a will by which he bequeathed his entire estate to his five grandsons of whom plaintiff was one. In 1889 the three elder grandsons, acting in their own behalf and on behalf of the plaintiff a minor, sold the property to the mortgagee. The plaintiff attained his majority in 1892 or 1893 and brought a redemption suit in 1905.

Held that the possession of the mortgagee did not become adverse to the plaintiff until the expiry of ten years from the date of the mortgage *i.e.*, 1895 and that the suit was within time.

Mata Din v. *Sheik Ahmed Ali* (P. C.) 16

———*Shiah Law-Widow's right in husband's property—Widow who had not borne an issue surviving the husband—Limitation—Adverse possession—Purchase of property in private sale by a mortgagee's separated heirs.*

Under the Shiah Law, a widow who had not borne to her deceased husband a child who survived him takes no interest in the immoveable property of the husband and her right to dower does not confer on her a saleable interest in the estate.

Held, that the purchase of a portion of the mortgaged property by the mortgagee's separated heirs from a person who had no title to convey and enjoyment thereon for over the statutory period conferred a title by adverse possession on the purchaser.

Mussammat Parbati v. *Muhammed Muzaffar Ali Khan* (P. C.) .. 11

———*Guardian defacto—Powers of sale—Essentials—Imperative necessity or necessary benefit.*

According to Mahomedan Law, a *defacto* guardian who is not a *dejure*, guardian of a minor can alienate the property of the minor only in cases of urgent imperative necessity and in cases which must, in their very nature, be necessarily beneficial to the minor.

A sale effected by the mother of a Mahomedan minor for defraying the expenses of the minor's sister's marriage or for the discharge of family debts is not binding on the minor.

Hyderman Kutti v. *Syed Ali* 244

———*"Hiba"—Essentials—Delivery of possession—Formal departure and entry—Necessary—Fatwas—Precepts and texts.*

There should be complete delivery of *scisin* for a *hiba* to be valid under the Mahomedan Law; but the Mahomedan Law does not contemplate any particular mode of delivery of possession.

Mahomedan Law—(*Contd.*) PAGE.

The question whether there has been a complete delivery or not in a particular case is a question of fact, to be determined with regard to the intention and contract of the parties and the nature of the property concerned in each case. It is not necessary in every case that the donor should formally depart from the premises which is the subject of a gift and that there should be a formal entry on the part of the donee.

Observations in Bailee's Digest 2nd Ed. p. 522 commented on.

Value of *Fatwas* discussed.

Distinction between the authority of Fatwas and that of Texts of the Koran or precepts of the Prophet pointed out.

Mathar Saheb v. *Hossain Saheb* 734

Malabar Law—*Maintenance—Woman living away from tarwad house with her husband—No forfeiture—Waiver, what will amount to.*

According to Marumakkattayam law a wife living in her husband's house is entitled to maintenance from her tarwad house.

Social customs may change without affecting the legal rights of parties.

It may be that on the facts of a particular case a wavier of the right to maintenance while a woman lives with her husband may be properly implied. If the husband is rich and able to provide properly for his wife and children and if no demand for maintenance is made on the tarwad for a long time, the court would be justified in inferring that there was no intention to make a demand on the tarwad for maintenance, but the question whether there was a waiver should be decided on the circumstances of each case.

Mathu Amma v. *Gopalan* 496

————*Nambudris—Affiliation as members of one illom of member of another illom—Validity—Family arrangement.*

According to the usage amongst Nambudris the members of an illom consisting of one male and two female members may validly affiliate another by requiring a member of another illom to marry and beget issue for the first illom; and female issue born of such marriage would be validly affiliated as members of the first illom.

Held also that a family arrangement in the nature of a partition between the members of an illom and the affiliated member was binding on the members to the arrangement.

A member who is born subsequent to the arrangement is not entitled to question it.

Kesavan Unni v. *Nicholas* 165

Master and servant—*Wages—Leaving service before expiry of period—Quantum meruit.*

Both according to justice, equity and good conscience and the statutory law as embodied in Ss. 39 and 64 of the Contract Act a servant who quits his master's service in India before the expiry of the contract period is entitled to be paid for the full months he worked under the master less the damages incurred by the master by the breach.

Held that a servant who engaged himself to a period of one year at a monthly salary but who left his master's services ten days before the expiry of the year was entitled to his wages for the full eleven months he worked.

Chokalinga Mudaliar v. *Mohomed Sheriff Saib* 680

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Mortgagor and Mortgagee—*Accounts—Deposit in Court—Forfeiture—Lapse to Government.*

Held, that in a matter of accounts between a mortgagor and his mortgagees, the mortgagees must give credit for an amount deposited in court by the mortgagor to the mortgagees' credit in the case pending an appeal to the Privy Council by the mortgagees on the ground that the mortgagee ought to have taken it out of court without prejudice to their pending appeal either by arrangement or with the sanction of the Court in India or the sanction of the Judicial Committee, which would have been given as a matter of course, even though the amount itself had been forfeited to Government by lapse of time.

Champat Singh v. *Jangu Singh* (P. C.) 738

Mortgage—*Redemption—Subsequent arrangement qualifying right to redeem—Oudh Estates Act S. 6.—Redemption—Onus.*

There is nothing in law to prevent the parties to a mortgage from coming to any arrangement subsequent to the execution of the deed qualifying the right to redeem.

Where the mortgagors are unable to produce the deed of mortgage and the mortgagee would not produce the deed on the ground it was lost, the onus is on the mortgagors-plaintiffs to show they have a right to the decree.

Shankar Din v. *Munshi Gokul Prasad* (P. C.) 621

Mortgage suit—*Suit by non-impleaded puisne mortgagee for redemption—Amount payable by puisne mortgagee for redemption.*

When a puisne mortgagee seeks to redeem the prior mortgage by reason of the fact that the prior mortgagee had obtained a decree for sale without impleading the puisne mortgagee in his suit on the prior mortgage the puisne mortgagee is bound to pay the prior mortgagee interest at the mortgage rate and not at the decree-rate.

The puisne mortgagee cannot treat the prior mortgagee as a mortgagee for one purpose and a decree-holder for another purpose. *Umesh Chander Sircar* v. *Zahur Fatima*, I. L. R. 18 C. 164 (P. C.), *Thenappa Chettiar* v. *Marimuthu Nadan*, I. L. R. 18 M. 258, *followed. Mahomed Ibrahim Hussain Khan* v. *Ambika Pershad Singh* I. L. R. 39 C. 527 (P. C.), declared not to have changed the law laid down in *Umesh Chander Sircar* v. *Zahur Fatima*, I. L. R. 18 C. 164 (P. C.)

Ponnambala Chetti v. *Muthusami Pillai* 284

Municipality—*Adverse possession against—Essentials—Trust—Extra-commercium property—Acquisition by prescription—Injunction—Declaration—Madras Municipal Act. S. 168.—Streets, rights of Municipality in.*

Held Per *curium* :—That in the case before their Lordships, the plaintiff who sued for a declaration of his right to a pial and for an injunction against the Local Municipality, had acquired under Act XV of 1877 by twelve years' adverse possession title to the site of the pial as against the Municipality; and (2) that the Municipality had the right to remove the obstruction caused by the pial under S. 168 of the Municipal Act; (3) that the plaintiff was consequently not entitled to an injunction and (4) that the plaintiff was not entitled to a declaration when the substantial relief *i. e.*, injunction was not granted.

Per *Sundara Aiyar* J.—Although it is not open to the Municipality to give up the rights of the public or to affect the right of way possessed by the public by any act of their own, that would not affect the capacity of a stranger to prescribe for title so as to affect the rights of the public.

The analogy of a trust and the prescription of title to trust properties which are in themselves *extra commercium* explained.

The question as to whether a possession is adverse or not does not depend on the needs or requirements of the owner, but on the character and occupation of the person in possession.

Though the soil is in one person another may be the owner of a building above the soil and the right to occupy a portion of space above the soil may be acquired by limitation.

Per *Sundara Aiyar* and *Sadasiva Aiyar* JJ.—Rights of a Municipality over land for purposes of laying out and preserving streets examined.

Basaweswara Swami v. *Bellary Municipal Council* 479

Native Indian States *See C. P. C.* 605

Negotiable instrument—*Mortgage of—Rights of Mortgagee—Mortgagee allowing suit on negotiable instrument to be barred—Liability of mortgagee—English equitable Rules, applicability to India—Stare decisis, rule of.*

A mere hypothecation or mortgage of a negotiable instrument does not vest the ownership in the hypothecatee or mortgagee nor operates as a transfer of the debt. A pledgee of a debt who has not obtained an assignment of it cannot sue to recover the debt.

In the absence of a transfer by endorsement the hypothecatee or mortgagee of it is not entitled to sue on the negotiable instrument and is much less bound to sue on it; and consequently, he is not liable to account for the loss that has occurred to the transferor in allowing it to be barred.

Great care has to be exercised in applying to India the English rules of law as to equitable rights. *Ramasami Pillai* v. *Muthu Chetti* I. L. R, 34 M. 53. dissented from.

Per *Sadasiva Aiyar* J :—A pledge of a negotiable instrument is an assignment thereof; and it entitles the pledgee or creditor to sue on it; and a creditor who allows the recovery of the amount due under the instrument to be barred is liable to be debited with the loss in an account between himself and his debtor. *Isri Prasad* v. *Rai Gunga Prasad Singh Bahadur* 14 C. W. N. 165, *Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan* I. L. R. 33 B. 610, *Ramasami Pillai* v. *Muthu Chetti* followed.

The principle of *stare decisis* should be followed in all doubtful matters.

Muthukrishnien v. *Viraraghava Iyer* 430

Negotiable Instrument Act, S. 28—*Agent's liability—Construction—No signature as agent—Effect of—English and Indian Law—Pleadings—Construction.*

Plaintiff brought a suit on a pro-note executed by 3rd defendant acting as agent of defendants 1 and 2 for goods supplied to defendants 1 and 2. Defendants, 1 and 2 were sought to be personally made liable and the 3rd defendant was sought to be made liable only in case defendants 1 and 2 were exonerated. The note was executed by 3rd defendant without indicating in the signature that he signed the note "as agent" and without expressly stating in the recitals that he did not intend to make himself presonally liable. But there were recitals in the note indicating the purpose for which the loan was contracted to have been in respect of goods supplied for defendants 1 and 2 and the 3rd defendant was described in the body of the note as one holding a power of attorney from defendants 1 and 2. At the hearing in the first court an additional issue was framed regarding the liability of the 3rd defendent as maker of the note in his own name.

Negotiable Instrument—(*Contd.*) PAGE.

Held per *Sundara Aiyar* J. (*Sadasiva Aiyar* J. dissenting).

That the suit should not have been, by the framing of the additional issue, converted in the face of the allegations in the plaint into a suit on a negotiable instrument against the 3rd defendant as maker of the note.

Obiter :—An agent to free himself from liability as maker of a note must either indicate on the note that he signs as agent or he must indicate on the note that he does not intend thereby to incur personal responsibility.

Held also that the 3rd defendant had indicated on the note that he was not to be personally liable.

The difference between the English and the Indian Law and the rules of construction in each indicated.

Per *Sadasiva Aiyar* J.—The court was right in framing the additional issue; the honest narrative given by the plaintiffs in their plaint as to the circumstances which led to the execution of the pro-note or the ignorance of the plaintiffs or of the 3rd defendant as to their mutual rights and liabilities under Exhibit A cannot deprive plaintiffs of their legal rights or exonerate the 3rd defendant from his legal liabilities.

An agent who signs a negotiable instrument without indicating in the signature that he signs as agent and without expressly stating in the preliminary recitals in the body of the note that he did not intend to make himself personally liable cannot escape liability under the note by the fact of his having described himself as agent in the body of the note and the note itself containing a recital that the debt was incurred by the principal.

Konetti Naiker v. *Gopalaiyar* 417

Penal Code, Ss. 406, 114—*Essentials—Meaning and scope—Criminal Procedure Code* Ss. 236, 337, 238—*Charge of Principal offence and conviction for abetment.*

Entrustment of the object matter is a necessary element of the offence of criminal breach of trust; and there can be no criminal breach of trust by a person of a jewel entrusted to a third person.

S. 114 of the Penal Code is applicable only where the act at the doing of which the abettor is present would itself amount to an offence. The section is not applicable to the case of a person abetting the pledging of a thing entrusted to a stranger.

There is no universal rule that in no case there can be a conviction for abetment where the charge was only for the principal offence. The question is what were the facts charged. If, on the facts, two charges *i.e.*, for the commission of the principal offence and the abetment can be framed, then the accused can be convicted of abetment though not charged separately. If the facts constituting the principal offence and the abetment are different as they generally are, then the conviction cannot be for abetment on a charge for the principal offence.

Subbaya v. *Emperor* 722

————**Ss. 499, 500**—*Defamation—Privilege—Accused's status—Statute—Construction—Penal Code—State of English Law to be considered when?*

The statement of a person charged with an offence in answer to question by the Court trying him "What have you to say" is an absolutely privileged statement so as to make him not liable to be punished for defamation under the Indian Penal Code. The privilege is not merely a qualified privilege *i.e.*, it is not subject to the condition that it should be made in good faith.

Penal Code—(*Contd.*) PAGE.

Opinion of *Richards* J. in *Emperor* v. *Ganga Prasad* I. L. R. 29 A. 685 approved.

The law of defamation as laid down in S. 499, Penal Code does not exclude the application of the doctrine of absolute privilege from the law of defamation in India.

The canon of interpretation of statutes laid down by *Lord Herschell* in *Bank of England* v. *Vagliano Brothers* A. C. 107 at 145, is not applicable to the interpretation of statutes like the Indian Penal Code which do not, like the Bill of Exchange Act, codify the law but create new law ; and consequently Courts are warranted in taking into consideration what the law of England was at the time the Indian enactment was passed.

Potaraju Venkata Reddy v. *Emperor*. (F. B.) 39

————**Ss. 499, 500**—*Defamation—Privilege—Statement before Registering Officer under the Registration Act, whether privileged?—Registrar not a judicial officer or a civil court.*

A defamatory statement made by a person opposing the registration of a will in his petition to the Registrar, objecting to the registration is not a privileged statement so as to except the party making if from liability to be punished defamation under S. 499, penal Code.

A Registration officer is not in the absence of express enactment to be deemed a judicial officer or a Civil Court.

Atchayya v. *Gangayya* I. L. R. 15 M. 138 doubted and declared overruled by S. 195 Cl. 2, C. P. C.

Krishnammal v. *Krishnaiyangar* 50

Pensions Act, Ss. 3, 4—*Applicabilily of—Effect of—"Gant of land revenue"—Land Revenue—Nature of relinquishment of right to land revenue—Grant, construction—Grant of land and of a land revenue—Pensions Act S. 4.*

A Grant after describing the lands granted proceeded thus "Total of 60 velies of land including wet and dry lands, water, trees, stones, nidhi, nikshapa, Treasure, Sidha, Sadhya (whatever is and may be brought into existence) present and future patti, all *baut* and all *Kajna* with all samudayams, with water poured from the hand. Boundaries to be fixed and the land made *dumala*"

Held on the contruction of the grant, that the grant was distinctly of the "patta," "baub" and "Kana" and of Kudivaram right and, therefore, was a grant of land revenue within the meaning of S. 5 of the Pensions Act.

Where a grant was of land (the kudivaram right) and of land revenue distinctly, a suit for declaring the invalidity of the resumption of the land by the imposition of land revenue is barred by S. 4 of the Pensions Act.

The object of the definition of "land revenue" in S. 3 of the Pensions Act was merely to include payment to be made by the Government and not to confine the expression "grant of money" to such payments.

S. 4 does not require that the grant should be of land revenue alone in order to shut out the jurisdiction of the Civil Court to entertain a suit relating to a grant of land revenue.

Opinion of the Allahabad High Court that S. 4 would apply only where the land revenue is payable by the Government to the grantee in *Manu Lal* v. *Fazal Imam* I. L. R. 33 A. 580. dissented from.

Pensions Act—(*Contd.*) PAGE.

Land revenue is not a servitude attaching to the land. The kudivaram and melwarm are distinct interests constituting the totality of ownership in the land. The revenue is not a servitude on property which belongs to the kudivaram holder.

The relinquishment of the right to recover land revenue due on land is tantamount to the grant of land revenue.

But it may be that if land itself is granted without any distinct grant of revenue thereon the case would not come under S. 4.

Jeeyamba Bai v. *Secretary of State for India* 687

Pleader—*Professional misconduct—Contempt of Court — Alteration of subpœna.*

Where a plaintiff who has been refused a warrant for the detention of the defendant by a Civil Court straightway starts a criminal process on the same subject matter and means of allegations to which the Civil Court attached no credit, obtains his warrant from the criminal court, almost as a matter of course he undoubtedly runs several risks of a serious character. He is not however, restricted by law to a single form of remedy. He may pursue all the legal remedies appropriate to his grievance, and his conduct does not necessarily involve any punishable contempt of the civil court, whatever may be its other consequences. Where a practitioner substitutes for the names in two subpoenas two other names he cannot be in the absence of evidence to defraud or other sinister motive convicted of forgery. At the most he should be taken to have committed an irregularity for which some pecuniary penalty on his part was an adequate punishment. A court cannot punish a man for alleged professional misconduct generally without specifying the charges and hearing him on those matters.

In the matter of Taylor. 194

———*See Professional misconduct* (P. C.) 114

———*Compromise—Special Vakalat—Giving power to compromise.*

A Vakil in India is both the solicitor who acts and the counsel who pleads.

Where the Vakalat given to the Vakil in a case empowered him to compromise the suit, no second or special Vakalat is necessary to empower him to compromise it.

Venkamma In re 381

Power of attorney—*Construction—Power to execute decrees does not include power of assignment.*

Held that a power of attorney giving power to execute decrees did not authorise the transfer of decrees for a sum considerably lower than the decretal amount.

The power to realize all moneys due to the principal might include a power to receive the money due under a decree by means of a transfer of it to a third person; but it cannot include the power to transfer a decree for a sum considerably less than the amount due under the decree.

Palaniappa Chettiar v. *Arunachella Chettiar* 595

Provincial S. C. Act Art. 31—*Second appeal—Suit of Small Cause nature—Question of title involved.*

Provincial S. C. Act—(*Contd.*) PAGE.

A suit for damages for trespass is a suit cognizable by a Court of Small Causes even though a question of title is involved therein ; and no second appeal lies if the value of the suit is less than Rs. 500.

Sitab Rai v. *Dubal Nagesia* 6 C. L. J. 238, dissented from.

Raghava Reddy v. *Krishna Reddy* 193

Pre-emption—*Hindus in Behar—Formalities—Manager of Court of Wards—Joint liability to pay Government Revenues.*

The right of pre-emption is enforceable in Behar irrespective of the persuation of the parties concerned. *Fakir Rawot* v. *Sheik Emamsbukhsh* (1863) B. L. R. F. B. Rulings p. 35 referred to.

The Musalman Law insists on the first formality technically called "the immediate demand" being observed by the pre-emptor or some one on his behalf immediately on receipt of news of the sale and secondly on the repetition of the demand with as little delay as possible under the circumstances in the presence of witnesses either before the vendor or vendee or on the premises. The manager of the pre-emptor's estate under the Court of Wards is competent, independently of S. 40 of the Bengal Court of Wards Act to observe the formalities on the pre-emptor's behalf. S. 40 itself fully clothes the manager with authority to observe the formalities without any necessity of subsequent adoption by the Court of Wards.

A Mahal is a unit of property ; it may consist of one village or of several villages ; it may be owned by one or several proprietors who may have an interest in all or some of the villages comprised in the estate. Joint liability to the Government Revenue arises from the fact that the parties own undivided interests in the estates and the joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue authorities when the share so partitioned becomes a separate unit of property. Consequently, a person jointly liable to pay the Government Revenue due on a Mahal can claim to pre-empt.

Jadu Lal Shaha v. *Maharani Janki koer* (P. C.).. 28

Professional misconduct—*Vakil's duty to the court and the client—Negligent management of office.*

Under Rule 95 of the Appellate Side Rules of the Madras High Court, pleaders are responsible to the Registrar for all transactions and printing charges incurred by him on their behalf under those rules. To that extent a Vakil must co-operate in the conduct of the suit with the Registrar and with the court under those regulations.

Vakils have the other general functions applicable not only to the bar in general, but to solicitors at large, that they must in the conduct of all suits entrusted to them, co-operate with the court in the orderly and pure administration of justice.

Where a Vakil was negligent in the management of the appeal entrusted to him and of his client's affairs which caused the procedure of the court to be the very opposite, of what such procedure should be, *viz.*, first responsible, secondly, orderly and thirdly pure *i. e.*, in not seeing that the client's money that was duly received by him was paid by his clerks into the court in proper time for the printing of the records, and that they properly represented matters relating to the case to the client, *held* affirming the decision of the High Court that there was

Professional Misconduct—*(Contd.)* PAGE.

reasonable cause for the suspension of the Vakil for a period of six months under Section 10 of the Letters Patent even though the Vakil himself be acquitted of direct and personal fraud in the case.

In re a Vakil 114

Registration Act S. 49—*Admissibility of unregistered document in evidence—Collateral purpose—Court's power to pass conditional decree in ejectment suit.*

Per Curiam :—Courts in India have power to refuse to grant a decree to the plaintiff except on terms indicated by obvious considerations of justice.

Plaintiff had executed a deed of mortgage in favour of the defendant in November, 1894. In 1896 he executed a deed of sale Ex. A with respect to the same property to defendant for a certain consideration. On the same day as the sale deed Ex. A a letter was written which showed that the transaction was intended to be an usufructuary mortgage. The defendant sued as upon the usufructuary mortgage and the suit was thrown out for non-registration of the letter. Plaintiff filed the present suit for recovery of the property on the ground that the sale was not intended to be a sale and consequently the lands never passed to defendant.

Held that it was competent to the court to decree possession to the plaintiff on condition that plaintiff do refund the consideration received by him.

Held. Per *Rahim* J. (*Miller* J. dissenting). S 49 of the Registration Act only shows that a document requiring registration cannot be proved in order to support a transaction affecting immoveable property or to enforce the terms of the document referred to: but it is admissible to prove the circumstances in which the property came to be in defendant's possession.

Per *Miller* J.—The document cannot be admitted in evidence to prove the nature of the possession of the defendant or the circumstances under which he derived possession, which the plaintiff sought to prove in the case, to entitle him to relief.

Muthe Venkatachllapathy v. *Pyinda Venkatachellapathy.* 652

Res Judicata See C. P. C. 543

Small Cause Courts Act, IX of 1887 art. 3—" *Act purporting to be done*" *meaning of.*

Art. 3 of the Provincial Small Cause Courts Act applies to suits relating to some distinct act done by an officer of Government etc. A mere failure to carry out a contract cannot be regarded as such an act. A suit for recovery of the contract amount due from the Government for the repair of a tank by a contractor is a suit of a small cause nature.

Secretary of State for India v. *Ramabrahmam* 732

————**Art. 28**—*Whole or share of the property of an intestate.*

A claim, for the return of jewels presented on the marriage of plaintiff's daughter and her husband, made after the death of the bride and the bridegroom is not a claim for any property of the intestate within the meaning of Art. 28 of the Provincial Small Causes Act.

Chinnayya v. *Achammah* 282

Specific Relief Act S. 42—*Declaration—Consequential relief—Plaintiff entitled to joint management—Possession prayed for.*

A plaintiff who is out of possession of charity properties cannot merely confine his suit to declaratory decree but should ask for possession, even though it be that according to him he is entitled to the right of management in alternate years only and that the Court may not be able to place him in possession on the date of the hearing by reason of the fact that it takes place in the period in which the opposite party was admittedly rightly in possession.

Ratnasabapathi v. *Ramasami I. L. R. 33 M. 425* and *Ram Das* v. *Hanumantha Rao* followed.

Appu Pillay v. *Perumal Pillay* 118

Stamp Act S. 36—*Cancellation of Stamp—" Has been admitted in evidence "—Meaning of.*

It is not possible to lay down any general rule as to what mode of cancellation would be effective as a cancellation of stamp.

S. 36 of the Stamp Act lays down a rule preventing only the exclusion of what already is evidence in the proceedings. But if certain proceedings terminated and other proceedings where the documents would not be regarded as being in evidence already, recommence *e.g.*, where the prior *ex-parte* proceedings were set aside, and new proceedings begin, S. 36 would have no application. After the *ex-parte* proceedings are once set aside subsequent proceedings are in substance different, though the suit is technically the same.

Solamalai Mudaliar v. *Vadamalai Muthiran* 273

Tort—*Right of way—Obstruction—Special damage.*

Per *Curiam*. Obstruction of a way without any special damage can afford no cause of action to a member of the public.

Per *Sundara Aiyar J* :—Special damage need not always be only pecuniary.

Per *Sadasiva Aiyar* J :—Special damage should be something substantial and not mere pecuniary damage to the extent of four annas or eight annas.

Husain Sahib v. *Narasimhappa* 541

Transfer of Property Act, S. 54—*Sale—" Price " meaning of—Evidence Act S. 92—Discharge of mortgage by oral sale of lands—Evidence, admissibility of—Exchange.*

A usufructuary mortgagee held possession of plots *A* and B under his mortgage. In a suit for redemption by the mortgagor, the mortgagee pleaded an oral sale of plot A in discharge of the whole mortgage in consideration of his freeing plot B of the mortgage lien in favour of the mortgagor, and also pleaded, in the alternative a prescriptive title to plot A as owner from the date of the said oral discharge of the mortgage.

Held per Curiam—That the transaction was invalid for want of registration and that the suit for redemption was not barred.

Per *Miller* J :—The transaction was an exchange and required registration for its validity.

(2) The intention to discharge the mortgage involved the intention to make certain transfers and it was impossible to say that if those transfers failed both parties nevertheless intended to discharge the mortgage.

Transfer of Property Act—(*Contd.*) PAGE.

Per *Sadasiva Aiyar* J :—That the transaction amounted to a sale or an exchange ; that in either view it was invalid for want of registration.

A transfer of property in consideration of the discharge of a debt is a sale, and if not, at least an exchange.

The meaning of the word " price " dwelt on.

Tiruvengadachariar v. *Ranganatha Aiyangar* 13 M.L.J. 500 not followed

A mortgagee cannot by merely asserting possession as owner under an invalid sale of the equity of redemption subsequent to mortgage convert his possession as mortgagee into a possession as owner and thereby plead article 144 of the Limitation Act in answer to a suit for redemption.

Oral evidence is admissible to prove discharge of a mortgage by payment of money or by receipt of profits, but not to prove a discharge by an invalid oral sale of the equity of redemption in a portion of the mortgagee's property in discharge of the mortgage debt.

Ariyaputhira Padayachi v. *Muthukumarasami.* 339

(2) ——— **S. 59**—*Attest—Jurisdiction of Court to frame necessary issue after argument—C. P. C.* (*Act XIV of 1882*) *S. 149.*

The word " attest " in S. 59 Transfer of Property Act means the witnessing of the actual execution of a document and not as in S. 50 of the Succession Act the attestation of an acknowledgment of execution merely.

A court trying a civil case is competent to frame a necessary issue after the close of the arguments in the case.

S. 149 of Act XIV of 1882 empowers the court to amend the issues or frame additional issues and make all such amendments or additional issues as may be necessary for determining the controversy between the parties ; and even apart from the express provision in the Code, every court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject matter of controversy between the parties.

Shamu Pattar v. Abdul Kadir Ravuthan. 321

(3) ——— **Ss. 60, 61**—*Partial redemption when allowed?—Consolidation of mortgages—Essentials.*

A mortgage is one and indivisible and the general rule is that there can be no partial redemption except in cases where the mortgagee, or, if there are more mortgagees than one, all such mortgagees have acquired in whole or in part the share of a mortgagor.

To allow a claim of consolidation of two mortgages it is necessary both under the Transfer of Property Act and otherwise that both should become united in title and come into the same hand.

Pledge v. *White* (1896) A. C. 187. *Riley* v. *Hall* 79 L. T. 244 referred to.

Velayudan Chetty v. *Alangaram Chetty.* 475

(4) ——— **S. 76 Cl. 1**—*Mortgagor and mortgagee—Accounts—Mesne profits, mortgagee's liability to account for, after date of tender.*

The provisions of S. 76 Cl. 1 making the mortgagee in possession liable to account for mesne profits after date of tender cannot be extended to cases where the mortgagor claims to split up the mortgage in consequence of the mortgagee

Transfer of property Act—(*Contd.*) PAGE

having become the owner of a portion of the equity of redemption or to a case where there are disputes between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himelf, at the risk of losing the interest on money due to him and becoming accountable for mesne profits.

Venkatarama Aiyar v. *Rangasami Aiyangar* 588

(5) ————**S. 91**—*Redemption by part owner of equity of redemption—whole, if entitled to redeem against the will of the mortgagee and other sharer.*

The owner of a definite share of the equity of redemption cannot as a matter of right insist on redeeming the whole of the equity of redemption against the will of the other owners in the equity of redemption, and that of the mortgagee. *Kondarakayil Mamu* v. *Kuttu* I. L. R. 6 M. 61. *Thachi Chettiar* v. *Ramanatha* I. L. R. 20 M. 295 at 298 commented on by *Sundara Aiyar* J. *Huthasanan Numbudri* v. *Parameshwaran Numbudri* I. L. R. 22 M. 209. *Krishnayya* v. *Muthukumarasami Pillai* I. L. R. 29 M. 217 at 229. diss. by *Sadasiva Aiyar* J.

Per *Sadasiva Aiyar* J :—*Obiter* :—A mortgagee can release his lien on any portion of the mortgaged property or sue for the sale of any other portion of the mortgaged property though such release or abstention would not affect the rights or liabilities as between themselves of the owners of the different portions of the equity of redemption,

Rathna Mudali v. *Perumal Reddy* 576

Trust Act Ss. 15, 20, 23—*Investment in unauthorized securities—Liability of trustee—Interest.*

A trustee is bound to comply with the provisions of S. 20 in the investment of trust money; and he is guilty of a breach of trust if he invests it otherwise than in accordance with the provisions of the section however well intentioned and honestly he might have acted. The measure of prudence required of a trustee by S. 15 must be regulated by any specific provisions applicable to special matters found in the other sections of the Act. Cl. 2 of S. 15 must be applied in conjunction with the other sections of the Act which regulate the cases in the measure of prudence required in particular cases.

Courts in India have not the power like the English Courts to relieve the trustee from the consequences of a breach of duty in the matter.

The trustee is liable to pay interest due on money lost owing to investment in an unauthorized manner: and "failure to invest trust money" in cl. e of S. 23 includes "Failure to invest in an authorized manner." Even otherwise, interest is awardable as damages on the trust money lost by reason of investment in an unauthorized manner.

Money due to a minor is money that cannot be applied immediately or at an early date within the meaning of S. 20.

Tirupatirayudu Naidu v. *Lakshmi Narasamma* 599

————**S. 27**—*Application to religious trust—Contribution—Usurpation of powers of trustee by Temple Committee—Litigation conducted by Committee Members—Contribution for costs.*

The principles embodied in S. 27 of the Trust Act are applicable to all kinds of trusts.

Trust Act—(*Contd.*) PAGE.

If Committee Members usurp the powers of a temple trustee, the usurpation cannot prevent the trustee from claiming and taking back his powers at any time; and the usurping committee members and the lawful manager are both liable as trustees of the Devastanam for all acts of breach of trust. The usurping Committee Members are trustees *deson tort* and as such are liable for the trust monies to the *cestui que trust* for the trust monies in respect of which they committed breach of trust.

Where five committee members usurp the functions of the trustee of a temple under their supervision and all conducted a litigation in the name of three of them only the costs of which they were directed to pay out of their private funds,

Held, that all the five were liable to contribute though three alone were nominally on the record.

Powers of committee members dwelt on.

Ramanathan Chettiar v. *Swaminatha Aiyar.* 278

Well—*Joint or part ownership in—Pleader's acquiescence in erroneous view of law by court, not binding on party—Evidence Act S, 13—Deeds evidencing transaction relating to suit property, evidentiary value of.*

There may be ownership in a well in different persons though it might stand on property belonging to one of them only.

A pleader's acquiescence in an erroneous view of the law by the Court that there can be no part ownership in a well is not binding on the party.

Transactions by a party, dealing with the property to which he lays a claim are important evidence of his title; and sometimes, they constitute the only evidence of title available.

Rama Iyengar v. *Mannar Iyen* 327

Will—*Construction—Vesting of legacies—Decree, form of—Suit by legatees for interest due.*

A will ran as follows.—

"After my death, minor N. aged 3 years and V., aged I year .. .. .. these two after the two above mentioned minors have become majors shall take in equal portions the principal Rs. 1000 and the balance of interest paid towards the documents as long as I live. If one of them die while the other is a minor, the other who survives shall take, after the said minors have become majors without any objection the principal and interest that may be due after my death as above mentioned. Nobody has right to demand the said amounts either at the time of minority of the said minors or at the time when one has become major."

As I have given up by means of this will the said amounts to be taken by the two minors after they have become majors at their pleasure, as mentioned above, the said Muthusami Aiyar, the father of the said minors .. .. has no right after my death either to the said amount or to its interest."

Held on the construction of the will that property vested in the minors even before majority, but that they were only not entitled to receive it; and that consequently, in a suit for recovery of interest and rent due on the land referred to in the will, that the plaintiffs—legatees would have a decree for the amount sued for, but the amount realized would be kept in court deposit until the second plaintiff attained majority and that the plaintiff might apply to the court for the in-

Will—(*Contd.*) PAGE.

vestment of the money in Government Pronotes. *Gordhandas* v. *Bai Ramcooer Bai*, I. L. R. 26 B. 449. distinguished

Narayana Aiyar v. *Anai Aiyar* 649

————*Proof—Sound disposing mind.*

If a testator has given instructions to another to make a will and that other prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator is that he should be able to think thus far "I gave X . . . , instructions to prepare a will making a certain disposition of my property. I have no doubt he has given effect to my intention and I accept the document put before me as carring it out."

Paker v. *Filgate* L. R. 8 P. D. 171, *Perera* v. *Perera* (1901) A. C. 354, followed.

Venkata Raghavalu Reddiar v. *Baggiammal* 54

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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Thakurain Lekhraj Kunwar ... ... *Appellant.**

v.

Thakur Harpal Singh and others ... *Respondents.*

Thakurain Lekhraj Kunwar *v.* Thakur Harpal Singh.

Hindu Law—Impartible Estate—Succession—Compromise between last owner and reversioner—Construction.

The owner of an impartible estate for the time being can make a will and put an end to the impartibility of the estate.

But where after the last holder's death, a will was set up by the widow and a suit was instituted by the reversioner contesting the genuineness of the will and an agreement was entered into by the parties which provided *inter alia* that the widow was to have an interest for her life in the estate subject to certain conditions and that the reversioner or his successor should be the absolute owner of the estate and should occupy the *gaddi* and the will was subsequently admitted to probate in a suit by the reversioner's widow claiming proprietary possession of the estate against her husband's distant cousin in the male line and certain other members of his family:—

Held that the rights of the other parties to the suit depended upon the construction of the compromise and not upon the will and that the impartible character of the estate was not changed by the terms of the compromise.

Appeal from a judgment and decree of the High Court at Allahabad (May 29, 1908) reversing a judgment and decree of the District Judge of Jaunpur (February 24, 1906.)

Sir Erle Richards, K. C. and Mr. B. Dube for appellant.

Mr. L. De Gruyther, K. C. and Mr. Ross for respondent.

Their Lordships' judgment was delivered by

Sir John Edge:—This is an appeal by Thakurain Lekhraj Kunwar (the plaintiff) from the decree of the High Court of Judicature for the North-Western Provinces of India, dated the 29th of May 1908, which set aside the decree in the plaintiff's favour of the District Judge of Jaunpur, and dismissed the plaintiff's suit and certain objections which had been filed by her.

In the suit in which the decree now under appeal was made the plaintiff, who was the widow of Sheopal Singh, claimed proprietary possession of the riasat of Singra Man in the District

* 22nd November 1911.

Thakurain Lekhraj Kunwar v. Thakur Harpal Singh.

of Jaunpur, and mesne profits. The defendants to the suit, who are respondents to this appeal, are Thakur Harpal Singh, a distant cousin in the male line of Sheopal Singh, Shamsher Bahadur Singh, a younger brother of the father of Thakur Harpal Singh, Raghuraj Bahadur Singh, and Rampal Singh, minors, sons of Shamsher Bahadur Singh, and Thakurain Janki Kunwar, the widow of Rudarpal Singh, who was a brother of Sheopal Singh and had died without male issue. The last common ancestor of Sheopal Singh and Thakur Harpal Singh was Dammar Singh.

The District Judge of Jaunpur gave the plaintiff Thakurain Lekhraj Kunwar a decree for possession as an Hindu widow, and decreed mesne profits. From that decree the defendants, Thakur Harpal Singh and Shamsher Bahadur Singh, on his own behalf and as guardian of his sons Raghuraj Bahadur Singh and Rampal Singh appealed to the High Court, and in that appeal the plaintiff filed objections to the decree of the District Judge, claiming that he was entitled to a decree for possession of the Singra Man Estate as an absolute owner and not, merely for the estate of a Hindu widow. The defendant Thakurain Janki Kunwar did not defend the suit; she claimed no interest.

The question upon which this appeal depends is a short one. The estate of Singra Man descended in the male line from Dammar Singh as an impartible estate to one Randhir Singh, who died without male issue in January 1895. In the family to which Randhir Singh, Sheopal Singh, and Thakur Harpal Singh belonged the rule of primogeniture applied so far as this estate of Singra Man was concerned. The pedigree of the family will be found in the judgment of the High Court; it is sufficient now to say that Sheopal Singh, who was the plaintiff's husband, was the son of Jagurnath Singh, a younger brother of Randhir Singh, and that on the death of Sheopal Singh without a son in July 1899, the defendant Thakur Harpal Singh was subject to the life interest of Thakurain Sonas Kunwar under a compromise, the next member of the family who was entitled to the possession of Singra Man, if the estate was then impartible. The question as to whether the estate had ceased to be impartible or had continued to be and was impartible on the death of Sheopal Singh depends upon the construction of an agreement of compromise of the 25th of April 1896, to which Sheopal Singh and Thakurain Sonas Kunwar, who was the junior widow of Randhir Singh, were the parties.

Randhir Singh, who was then 74 years of age, and in possession of the impartible estate of Singra Man, made a will on the

15th December 1894, by which he left his entire estate and every kind of movable and immovable property of which he was then in possession to Thakurain Sonas Kunwar, his junior wife. It is admitted that if Randhir Singh was then of testamentary capacity he had power as the owner in possession of the impartible estate of Singra Man to make that Will, and by it to put an end to the impartibility of the estate, and to exclude his nephew Sheopal Singh from the succession, which was the effect of the Will as it was executed. After the death Randhir Singh his widow Thakurain Sonas Kunwar applied for grant to her of probate of Will. Sheopal Singh and others filed objections to probate being granted; thereupon in March 1896 Sheopal Singh brought a suit in the Court of the Subordinate Judge of Jaunpur against Thakurain Sonas Kunwar and Thakurain Shankar Kunwar, the senior widow of Randhir Singh, a *pro forma* defendant, and Babu Soridat also a *pro forma* defendant, in which Sheopal Singh alleged that when Randhir Singh was seriously ill and on the point of death, and quite incapable of entering into any contract or of understanding any transaction, the well-wishers of Sonas Kunwar and Shankar Kunwar, having collected together, caused the Will to be executed. Sheopal Singh further alleged in that suit that according to the old custom and nature of the property, and also on the strength of right of survivorship the right to occupy the *gaddi*, and to enter into possession of the entire estate devolved upon him on the death of Randhir Singh, and he prayed for a declaration that the Will of the 15th of December 1894 was null and void as against him and the estate, and for a decree dispossessing Thakurain Sonas Kunwar and Thakurain Shankar Kunwar, and awarding absolute possession to him, Sheopal Singh, over the entire estate of Singra Man, together with imalaks, movable and immovable property appertaining to the said estate.

On the 25th of April 1896 Sheopal Singh and Thakurain Sonas Kunwar entered into an agreement of compromise, which was executed by them and was in the form of a petition to the Court of the Subordinate Judge of Jaunpur in the suit which had been brought by Sheopal Singh against Sonas Kunwar, Shankar Kunwar, and Babu Soridat. That petition was presented to the Court of the Subordinate Judge, and on the 27th of April 1896, the Subordinate Judge made a decree in the suit in accordance with the petition giving possession of the estate to Sonas Kunwar for her life subject to the terms of the compromise:—

The petition of compromise was as follows:—

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"1. The name of Musammat Thakurain Sonas Kunwar will "continue to be recorded in the revenue papers in the same way in "which it stands recorded, and she will remain in possession during "her life time of all the movable and immovable properties, of "which Randhir Singh was in possession, exercising the powers of "*gaddinasties* (occuption of *gaddi*) without the power to transfer "or change the estate in any way.

"2. I, Thakur Sheopal Singh, will take the sum of Rs. 12,000 a "year at the rate of Rs. 1,000 per month from Musammat Thakurain "Sonas Kunwar for all my expenses, and I, Musammat Thakurain "Sonas Kunwar, will pay the same. I, Thakur Sheopal Singh, will "not interfere with the estate in any way in the lifetime of Musammat "Sonas Kunwar. After the death of Musammat Thakurain Sonas "Kunwar, I, Thukur Sheopal Singh, or any representative of mine "who may be living at the time, will be absolute owner of all the "movable and immovable properties possessed by Rai Randhir "Singh, and will occupy the *gaddi*. In case of non-payment of the "fixed annual allowance, I, Shakur Sheopal Singh, will have power "to recover the same by instituting a suit and attaching the profits "and movable property belonging to Thakurain Sonas Kunwar.

"3. If I, Thakur Sheopal Singh, have to go to any member "of the brotherhood, or any *rais* on the occasion of any "ceremony or otherwise, I will have authority to take as much, "equipage belonging to the estate as I require, and when I go out "for recreations, etc., I will take any conveyance I like for my use. "Thakurain Sonas Kunwar will have no power to forbid me.

"4. If, on any particular occasion, any indispensable necessity "arise in the estate, and it be necessary to take a loan, we, Thakur "Sheopal Singh and Musammat Thakurain Sonas Kunwar will, in "concurrence with each other, borrow five or ten thousand rupees, "and repay the same gradually from the profits of the estate.

5. I, Thakurain Sonas Kunwar, also accept all the aforesaid "conditions. It is therefore prayed that the case may be struck "off as a contested one on the basis of this compromise, and the "costs incurred by the parties be charged against themselves. This "compromise may be embodied in the decree. Musammat "Thakurain Shankar Kurnwar and Sridat, *pro froma* defendants, "have been exempted."

Sheopal Singh died on the 27th of July 1899 without issue male, and without having made any disposition by Will or otherwise of his interrest in the Singra Man Estate. Thakurain Sonas Kunwar, who had been in possession of the estate under the com-

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promise of the 25th April 1896, died on the 20th of June 1904, and thereupon Thakurain Lekhraj Kunwar and Thakur Harpal Singh respectively claimed possession of the estate. On the 6th of July 1904 the Collector of Jaunpur ordered mutation of names in favour of Thakur Harpal Singh; from that order Thakurain Lekhraj Kunwar appealed to the Commissioner of Benares, who on the 2nd of September 1904 dismissed the appeal.

The District Judge of Jaunpur in his judgment in this suit held that the estate had descended to Thakurain Sonas Kunwar under the will of Randhir Singh by an entirely new title and had thereby lost its character of impartibility, and was no longer subject to the special custom of descent. The District Judge further held that the estate which Sheopal Singh would have taken had he survived Thakurain Sonas Kunwar would be self-acquired by Sheopal Singh as arising out of the contract of compromise with Thakurain Sonas Kunwar. As the learned Judges in the High Court rightly observed, the District Judge went behind the compromise and held that the Will was a valid will binding on Sheopal Singh, and determined what in his opinion were the rights of the parties before the compromise, the very thing the avoidance of which led to the compromise. The learned Judges in the appeal in the High Court held that the rights of the parties to this suit depended upon construction of the compromise, but not upon the will of Randhir Singh. With that conclusion their Lordships in this appeal agree. They also held that:—

"Upon the language of the compromise it is not possible to "hold that the character of the estate, as it had been handed down "from father to son for generations was changed. As an im-"partible estate Sheopal Singh laid claim to it, and the compromise "provided that as an impartible estate it should devolve upon him."

And they accordingly dismissed the suit.

Their Lordships consider that the High Court put the only possible construction upon the agreement of compromise. Sheopal Singh never admitted the validity of the Will as against him, and never admitted that Thakurain Sonas Kunwar had obtained any title under the Will. It is obvious from the terms of the compromise that Sheopal Singh consistently maintained that the Will was invalid, and consequently that Thakurain Sonas Kunwar had taken no title under it, and that the estate as an impartible estate had vested in him on the death of Randhir Singh. By the compromise Sheopal Singh, reserving to himself an income of Rs. 10,000 a year out of the estate, gave to Thakurain Sonas Kunwar a bare interest for her life in his impartible estate. Sheopal Singh in the agreement

Thakurain Lekhraj Kunwar *v.* Thakur Harpal Singh.

of compromise carefully provided that on the death of Thakurain Sonas Kunwar, he or his successor should be the absolute owner of the estate and should occupy the *gaddi*, that on the occasion of any ceremony, or when he should go out for recreation, he should have the right to take as much equipage and any conveyance belonging to the estate for his use as he should require, and that Thakurain Sonas Kunwar should have no power to forbid him; and that should it be indispensably necessary to raise any money on the estate by way of loan he and Thakurain Sonas Kunwar should in concurrence with each other borrow Rs. 5,000 or Rs. 10,000 and repay the same gradually from the profits of the estate. Under the compromise Thakurain Sonas Kunwar had no power to incumber the estate for any purpose except in conjunction with Sheoraj Singh. The terms to which their Lordships have referred are consistent only with the construction placed upon the compromise by the High Court, and there are no terms in the compromise which suggest any other construction. To these terms Thakurain Sonas Kunwar submitted. It may be mentioned that the Subordinate Judge of Jaunpur before making his decree of the 27th of April 1896, took the precaution of ascertaining that Thakurain Sonas Kunwar understood the terms of the compromise. The High Court rightly dismissed the suit of Thakurain Lekhraj Kunwar.

The fact that after the compromise the will of Randhir Singh was admitted to probate did not affect the rights of Sheoraj Singh.

Their Lordships will humbly advise His Majesty that the judgment and decree appealed against should be affirmed and the appeal dismissed with costs.

Solicitors:—*Messrs. T. C. Summerhays and Son* for appellant.

Solicitors:—*Messrs. Barrow, Rogers and Nevill* for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Mata Din ... ... *Appellant.**

v.

Sheik Ahmad Ali ... ... *Respondent.*

Mahomedan Law—Guardianship—Powers and liability of defacto guardian—Limitation Act Art. 44—Applicability to sales by defacto or unauthorized guardian—Art. 44 has no application to the sale by an unauthorized person acting as guardian—Limitation Act Art. 144—Sale by unauthorized

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* 16th January 1912.

guardian to mortgagee—Suit by minor for redemption within twelve years after-period allowed in mortgage deed.

Mata Din.
v.
Sheik.
Ahmed Ali.

According to Mahomedan Law in the absence of duly appointed testamentary guardians in the case of a minor to whom property is given by another the care of the minor's property would devolve first on the minor's father and executor, next on the paternal grandfather and his executor, and failing these the right of nomination of a guardian would "rest in the ruling power and its administration."

A *defacto* guardian, if not a *dejure* one, may assume important responsibilities in relation to the minor's property, but cannot thereby clothe himself with legal power to sell it.

A person mortgaged his property in 1885 to the defendant with possession for a term of ten years. The mortgagor died in 1887 leaving a will by which he bequeathed his entire estate to his five grandsons of whom plaintiff was one. In 1889 the three elder grandsons, acting in their own behalf and on behalf of the plaintiff, a minor, sold the property to the mortgagee. The plaintiff attained his majority in 1892 or 1893 and brought a redemption suit in 1905:

Held that the possession of the mortgagee did not become adverse to the plaintiff until the expiry of ten years from the date of the mortgage *i.e.*, 1895 and that the suit was within time.

Appeal against a judgment and decree of the Court of the Judicial Commissioner of Oudh (August 7, 1907) varying a decree of the Court of the District Judge of Lucknow (March 9, 1907), which affirmed a decree of the Court of the Subordinate Judge of Lucknow (May 28, 1906.)

Mr. K. Brown and A. P. Sen for appellant.

Mr. L. De Gruyther, K. C. and B. Dube for respondent.

Their Lordships' judgment was delivered by

Lord Robson :—In the case the appellant has been unsuccessful, first, before the Subordinate Judge at Lucknow, next before the District Judge of Lucknow, and lastly before the Court of the Judicial Commissioner of Oudh. The Court of the Judicial Commissioner granted a certificate for an appeal to their Lordships' Board on the ground that the case raised a question of law as to whether the transfer of a Muhammadan minor's property by a person who was not his natual guardian should be upheld, if made to discharge a debt payable by the minor.

The facts of the case are these:—

Sheikh Ahmad Ali, the respondent, was the grandson of Amir Haider, who, in his lifetime, was possessed of two villages, Kabirpur and Karora. Amir Haider mortgaged a 15 annas share in Kabirpur to the defendant (appellant) on the 2nd December 1885, and on the 7th August 1886 he executed another mortgage in favour of the same creditor of a 4 annas share in Karora. The mortgages provided that the mortgagee should take, (and he duly took), imme-

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diate possession of the mortgaged property for the purpose of realising the agreed interests out of the annual profits, making over the surplus, if any, to the mortgagor. The terms of the said mortgages were for ten and seven years respectively.

Amir Haider died on the 12th August 1887, leaving a Will, dated the 7th December 1886, by which he bequeathed his entire estate to his four grandsons equally. The plaintiff was about 12 years old when his grandfather died. Afterwards, on the 15th June 1889, the three elder grandsons, on their own behalf, and one of them, Ashraf Husain, purporting to act also as the guardian of the plaintiff, sold the village at Kabirpur to the appellant in consideration of the discharge by him of the debts secured thereon and on Karora, together with certain other smaller sums, making up a total of Rs. 18,500. The effect of this sale, if held good, was that the plaintiff lost his interest altogether in the village of Kabirpur, which was the larger and more important property, while the smaller village Karora was thenceforth free of the mortgage.

The plaintiff on attaining his majority in 1892 or 1893 made no attempt to impeach this transaction, though he knew of it, but in September 1905 he tendered to the defendant the amount of mortgage money necessary to redeem his share of the mortgage property and on the defendant refusing to accept it, he brought this action for redemption.

He contends that the sale deed of the 15th June 1889 is void, as against him, on the ground that his brothers had no authority under the grandfather's will to act as executors or to sell his share, and that Ashraf Husain who purported to represent him in that transaction as his guardian was not entitled so to act. The appellant contends that the four grandsons were entitled to act as executors under Amir Haider's will, but their Lordships agree with the Courts below in finding that there is nothing in the Will justifying that view.

The testator left the whole of his property (with certain unimportant exceptions), to his four grandsons in equal shares, and subject to equal obligations in respect of his debts and expenses, but he did not expressly appoint any executors of his will or guardians of his minor grandchildren. It was argued that an express appointment was not necessary if the testator had clearly shown by his Will an intention to entrust its administration to particular individuals, but on a fair construction of this Will no such intention can be gathered from it. He left his property to his grandsons so that

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each share thereof vested at once in the devisee, subject to the obligations attaching thereto, and there appears to be no necessity for any act of an executor to complete the operation of the Will. No doubt the testator contemplated a partition by the grandsons themselves of the property devised to them, and in that case it would be necessary for his grandson, if still an infant, to have a guardian, but there is nothing whatever to show that he intended all or any one of the brothers to act in that capacity. So far as his intention is concerned, it may well have been that if, and when, the necessity for a guardian arose the selection should be made by the Court.

The family were Muhammadans and were governed by the Muhammadan law relating to guardianship. According to that law, in the absence of duly appointed testamentary guardians the case of Ahmad Ali's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would "rest in the ruling power and its administration." (Macanaghten's "Principles of Mahomedan Law" 5th Ed. page 304.) The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court. Both they and the appellant seem to have had that fact in their minds when they executed the deed of the15th June 1889 effecting the sale of Ahmad Ali's share in the land, for they stipulated that if Ahmad Ali at any time brought a claim on the ground of minority, and any dispute thereby arose in respect of Mata Din's possession, the three elder brothers should be answerable for the same together with costs.

It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a *de facto* guardian. He may by his *de facto* guardiaship assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

There has been much argument in this case in the Courts below, and before their Lordsips, as to whether, according to Muhammadan law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case. To begin with, the appellant has not succeeded in

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showing that the disputed sale of 1889, although made for the payment of an ancestral debt, was made of necessity, or was beneficial to the minor. On the contrary, the Courts below have all found on the evidence that it was unnecessary and cannot be said to have been beneficial so far as Ahmad Ali was concerned.

It is next found as a fact, (and their Lordships see no sufficient reason to find otherwise), that the plaintiff on coming of age never acquiesced in the transaction which he now seeks to impeach, and that there was nothing in his conduct on which the defendant's plea of estoppel could be justified against him. Unless, therefore, the plaintiff's remedy is barred by the Indian Limitation Act XV of 1877, he is now entitled to the relief prayed for, as modified by the judgment of the Court of the Judicial Commissioner.

As to the plea of limitation, the appellant (defendant) placed reliance on Articles 44 and 144 of the Indian Limitation Act, 1877.

Article 44 prescribes a period of 3 years within which a ward who has attained majority may set aside a sale made by his guardian the time running from the date of the ward's majority. This provision has no application to the present case for the sale here was effected not by a guardian but by a wholly unauthorised person.

Article 144 deals with immovable property not otherwise specially provided for by the Act and prescribes a period of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. In this case, the appellant was entitled under his mortgage to full possession of Kabirpur and receipts of its rents and profits for 10 years from the 2nd December 1885. The respondent came of age on some date in 1892 or 1893. He was then certainly entitled to treat, (and by his subsequent tender of the mortgage money it is shown that he has in fact treated), the mortgage as subsisting, so far as he was concerned. Under these circumstances, the possession by Mata Din of Kabirpur did not become adverse to the respondent until the 2nd December 1895, and as this action was begun in 1905 it was well within the period of limitation.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors:—*Messrs. T. L. Wilson & Co.*, for appellant.

Solicitors:—*Messrs. Barrow, Rogers and Nevill* for respondent.

IN THE JUDICAIL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Present:—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Musammat Parbati ... ... *Appellant.**

v.

Saiyid Muhammad Muzaffar Ali Khan and others. *Respondents.*

and

Saiyid Muhammad Muzaffar Ali Khan and others. *Appellants.*

v.

Musammat Parbati ... ... *Respondent.*

Musammat Parbati *v.* Muhammad Muzaffar Ali Khan.

Mahomedan Law—Shia Law—Widow's right in husband's property—Widow who had not borne an issue surviving the husband—Limitation—Adverse possession—Purchase of property in private sale by a mortgagee's separated heirs.

Under the Shia Law, a widow who had not borne to her deceased husband a child who survived him takes no interest in the immovable property of the husband and her right to dower does not confer upon her a saleable interest in the estate.

Held, that the purchase of a portion of the mortgaged property by the mortgagee's separated heirs from a person who had no title to convey and enjoyment thereon for over the statutory period conferred a title by adverse possession on the purchaser.

Consolidated appeals from a decree of the High Court at Allahabad, dated June 13, 1907, in part affirming, and in part reversing, a decree of the Subordinate Judge of Saharanpur, dated July 14th, 1904, which dismissed the suit.

Sir Robert Finlay, K. C. and B. Dube for defendants.

De Gruyther, K. C. and H. Cowell for plaintiffs.

Their Lordship's judgment was delivered by

Sir John Edge:—These are consolidated appeals from a decree of the High Court of Judicature for North-Western Provinces at Allahabad, dated the 13th June 1907, which partly affirmed and partly reversed a decree of the Subordinate Judge of Saharanpur, dated the 14th July 1904, by which the suit had been dismissed.

The suit was brought on the 1st September 1903 to obtain proprietary possession of 13 biswas, 6 biswansis, 3 tawansis, 6½ kachwansis and a fraction of the 20 biswas of Mauza Lohari. The plaintiff's case briefly was that one, Mehdi Ali, whose representatives in title they alleged themselves to be had in 1/6 mortgaged

* 21st February 1912.

Musammat Parbati v. Muhammah Muzaffar Ali Khan.

the shares in Mauza Lohari, possession of which they claimed, to Sita Ram and his son Sheo Lal, that the mortgage debt had been discharged by the usufruct; and that the defendants were the representatives of the mortgagees and still held possession under no other title; and the plaintiffs claimed a decree for proprietary possession and for mesne profits. The case of the defendants was that they held possession not under the mortgage of 1846, but under a private sale of the 27 May 1853, of 10 biswas of Mauza Lohari and under an auction sale of the 20th March 1854, of the remaining 10 biswas of Mauza Lohari, which sales they alleged were made in order to discharge debts which had been contracted by Mehdi Ali. In effect the defendants' case was that by reason of the sales of 1853 and 1854 the equity of redemption in the shares which were mortgaged in 1846 passed to those through whom they claimed title. It was also contended on behalf of the defendants that they were not precluded from setting up a title by adverse possession by the fact that possession of the shares in suit had been originally obtained under the mortgage of 1846.

The facts as found by the Board are briefly as follows:—

On the 22nd July 1846 Mehdi Ali, who owned the whole 20 biswas of Mauza Lohari, borrowed Rs. 4,000 from Sita Ram and his son Sheo Lal, and executed in their favour a mortgage for the term of two years of the shares which are the subject of this suit. The mortgage was usufructuary and the mortgagees were put in possession under it. Incidentally it may be mentioned that the Subordinate Judge found as a fact that the mortgage debt had been discharged by the usufruct before 1863. If it were necessary in this appeal to decide that issue their Lordships would probably not be prepared to dissent from that finding of the Subordinate Judge.

Mehdi Ali, who was a Shia Muhammadan, died on the 9th January 1852, and left surviving him two widows, Ashrafunnissa and Umda Begum, and certainly three daughters who had been born to him by Umda Begum. Through one of those daughters, Askari, who subsequently married and left issue, the plaintiffs claim title. It has been contended, on behalf of the defendants that Mehdi Ali also left surviving him a daughter born to him by Ashrafunnisa. On behalf of the plaintiffs it has been contended that Mehdi Ali left surviving him no daughter by Ashrafunnisa, and that Ashrafunnisa was a childless widow. In the view which their Lordships take of this case it is immaterial whether Mehdi Ali left or did not leave, a daughter surviving him by Ashrafunnisa.

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It may, however, be mentioned that after Mehdi Ali's death, for some reason which the evidence does not explain, 10 biswas of Mauza Lohari were treated as the share of Ashrafunnisa, and the remaining 10 biswas were treated as the share of Umda Begum and her three daughters.

Mehdi Ali died heavily in debt, and after his death in 1852 suits to recover debts which were due by him were brought by his creditors against Ashrafunnisa, Umda Begum, and her three daughters, as the representatives of Mehdi Ali, and money decrees were obtained in those suits. One of those suits was brought by Sheo Lal on the 8th July 1852, on a bond payable on demand, to recover with interest Rs. 2,000 which Sheo Lal had lent to Mehdi Ali on the 29th May 1849. In that suit Sheo Lal obtained a decree for Rs. 2,786—5—6 principal and interest, against Ashrafunnisa, Umda Begum, and the three daughters of Umda Begum, all of whom were sued as the heirs of Mehdi Ali. Under that decree the 20 biswas of Mauza Lohari were attached. On the 5th May 1853 a sale proclamation was made fixing the 20th June 1853 as the date for the auction sale of the 20 biswas in execution of the money decree. On the 19th of May 1853, Sheo Lal, through his pleader, applied to the Court to remove the attachment in order to enable the defendants in that suit to pay the decree money by a private sale of the estate of Mehdi Ali deceased. On that application the Court removed the attachment. On the 27th May 1853 Sheik Husain, acting under a power of attorney, which had been executed for that purpose by Ashrafunnisa and had been duly registered, executed on her behalf a sale deed of 10 biswas of Mauza Lohari in favour of Baldeo Sahai, son of Sheo Lal, the consideration being Rs. 7,500. In that sale deed it was stated that two-thirds of three seels of the 20 biswas of Mauza Lohari had been from the 22nd of January 1846 in the exclusive possession of Sita Ram and Sheo Lal under the mortgage for Rs. 4,000 of 1846 for Mehdi Ali to them and it was stated that Mehdi Ali had died, and had left a considerable amount of debt unpaid, that Ashrafunnisa had remained the heir of half the estate of Mehdi Ali in lieu of her dower debt; and in order to satisfy the decrees held by, and debts due, to Sheo Lal she made an absolute sale of the 10 biswas share to Baldeo Sahai. It was by the sale deed agreed that Rs. 2,000 of the purchase money should be left with Baldeo Sahai, and that he should have power to pay the Rs. 2,000 to the mortgagee and to redeem the subject of the sale. In the sale deed the 10 biswas were described as Ashrafunnisa's share. After that sale the 10 biswas were entered in the revenue papers as Baldeo Sahai's share by

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private sale. Baldeo Sahai obtained possession of the 10 biswas share and held possession of the share until he died in 1895, when the defendants as his representatives obtained possession.

It has been contended on behalf of the plaintiffs, first, that Ashrafunnisa had no title to the 10 biswas share in Mauza Lohari and, consequently had no title which she was capable of passing by the sale deed, and secondly, that Baldeo Sahai was a member with his father Sheo Lal of a joint Hindu family, and that the family held possession as mortgagees and could not set up a claim of adverse possession against the representatives in title of Mehdi Ali, the mortgagee of 1846.

It has not been suggested that Ashrafunnisa had any interest in Mauza Lohari which she could sell other than such interest, if any, in the immovable property of Mehdi Ali as she obtained under the Shia law as his widow. Her right to dower did not confer upon her a saleable estate in Mauza Lohari. If she had not borne to Mehdi Ali a daughter who survived him Ashrafunnisa as his widow took no title to any share in Mauza Lohari. If on the other hand, as the defendants have contended, Ashrafunnisa had borne to Mehdi Ali a daughter who survived him for a few months, Ashrafunnisa's share as his widow, and the share of his daughter which on that contention came to her on the daughter's death, did not together amount to a 10 biswas share in the Mauza. If Ashrafunnisa had any other title in 1853 to the 10 biswas share which she purported to sell to Baldeo Sahai, it is not been shown what it was or how she had obtained it. But it is not necessary to consider what title, if any, Ashrafunnisa had to the 10 biswas share, as by the sale deed of the 27th May 1853 Ashrafunnisa sold to Baldeo Sahai such interest, if any as she had in the 10 biswas of Mauza Lohari, and Baldeo Sahai got possession of the 10 biswas and in course of time obtained a title by adverse possession to the whole 0 biswas or any portion of that share which Ashrafunnisa may not have been empowered to sell to him, and that title became indefeasable unless he or the defendants who claim under him were precluded from setting up a title of adverse possession.

The High Court found as a fact that Baldeo Sahai was in 1846, and continued to be a member of the joint Hindu family of which his father Sheo Lal had been a member, and on that finding of fact decided that Baldeo Sahai's possession and the possession of the defendants as his representatives had always been that of mortgagees and consequently that Baldeo Sahai and those who claim under him were precluded from setting up any title of

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adverse possession to any portion of the share which was mortgaged in 1846 to Sita Ram and Sheo Lal. The Lordships are unable to agree with the findings of fact of the High Court upon which that decision was based. At the date of the mortgage of 1846 Baldeo Sahai was undoubtedly a member of the joint Hindu family, of which Sita Ram and Sheo Lal were members and that family was governed by the law of the Benares School of the Mitakshara. Their Lordships, however, find on evidence, which they considered is unimpeachable, that in 1847 or 1848, owing to disputes in the family, Baldeo Sahai ceased to be joint in food and joint in business with Sheo Lal, but no partition of the family property was then made, and thence forward during their lives Baldeo Sahai and Sheo Lal had been separate in food and in business. Their Lordships also find that when Sheo Lal and Baldeo Sahai ceased to be joint in food and in business Baldeo Sahai received a present of a considerable sum of money from his grandmother, with which he carried on the business of a money-lender on his own account, and that out of his separate self-acquired property he found the purchase money of Rs. 7,500 of the sale deed of the 27th of May 1853. The oral evidence showing a separation is in their Lordship's opinion confirmed by the terms of that deed. Ashrafunnisa purported to sell the 10 biswas to Baldeo Sahai as a person who was not a mortgagee under the mortgage of 1846. So far as the 10 biswas which Ashrafunnisa purported to sell to Baldeo Sahai on the 27th of May 1853, their Lordships find that a title at least of adverse possession has been established and that the defendants are not precluded from setting up that defence.

Their Lordships concur with the finding of the Subordinate Judge and the finding of the High Court that the remaining 10 biswas share in Mauza Lohari was sold to Sheo Lal on the 20th of March 1854, at an auction sale held in execution of a decree for money which had been obtained by a creditor of Mehdi Ali, in a suit bronght against Umda Begum and her three daughters as the heirs and representatives of Mehdi Ali, and Sheo Lal obtained possession and held it until he died, when his interest passed to his son Baldeo Sahai as his heir.

The plaintiffs failed to establish any title by way of redemption or otherwise to any interest in Mauza Lohari, and their suit was rightly dismissed by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeal of the representatives in title of Baldeo Sahai be allowed

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with costs and the decree of the High Court be varied by dismissing the appeal to that Court with costs, and that the appeal of Saiyid Muzaffar Ali Khan and other plaintiffs to His Majesty in Council be dismissed with costs.

Barrow, Rogers and Nevill, Solicitors for defendants.

Ranken Ford, Ford and Chester, Solicitors for plaintiffs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Hight Court of Judicature at Madras.]

Present :—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Vasudeva Mudaliar and others ... ... *Appellants.**

v.

Sadagopa Mudaliar ... ... *Respondent.*

Limitation Act S. 31—" Suit pending." Meaning of

Vasudeva Mudaliar v. Sadagopa Mudaliar.

Where a mortgage suit for foreclosure or sale was remitted by the Privy Council to be disposed of for further procedure and enquiry by the Court in India and that enquiry had not been entered upon at the date of the passing of Act IX of 1908, held that the suit was pending within the meaning of S. 31, Cl. I of Act IX of 1908.

Appeal by the defendants against the judgment and decree of the High Court of Judicature at Madras, dated the the 16th December 1908 and made in Appeal No. 164 of 1902 which was remitted to the said High Court by an order in Council, dated the 12th August 1907.

De Gruyther, K. C. and Kyffin for appellants.

Sir Robert Finlay, K. C. and Kenworthy Brown for respondent.

Their Lordships' Judgment was delivered by

Lord Shaw :—This is an appeal against the judgment of the High Court of Judicature at Madras, dated the 16th December 1908.

On the 23rd September 1899 a suit was brought in the Court of the Subordinate Judge of Negapatam, founding upon a certain mortgage of date the 22nd September 1883, and with the object of recovering the mortgage debt by sale of the mortgaged property.

That Judge held that part of the claim was of a nature to which, under Article 132 of the 2nd Schedule of the Indian Limitation Act of 1877, the twelve years' rule of limitation would apply. The High Court, on appeal, held, on the other hand, that the article applicable was No. 147, the sixty years' rule of limitation.

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*21st February 1912.

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On appeal to this Board, the latter decision was reversed and the former restored. This occurred on the 22nd July 1907. The order itself, by His Majesty in Council, was dated the 12th August 1907.

It appears that the question is one upon which there has been much diversity of opinion in India, and conflicting decisions in the High Courts of Madras, Bombay, and Allahabad were referred to in this connection.

In view of the argument presented in this appeal, it is necessary to cite the exact terms of the former decision. They are these:—

"Their Lordships will humbly advise His Majesty that it should be declar- "ed that Article 132 is the Article which provides the rule of limitation appli- "cable to this case, and that the case should be remitted to the High Court to be "disposed of in accordance with this declaration."

A remit took place accordingly.

The reason for a remit is obvious. While the defendant had pleaded the limitation, the plaintiff had alleged payments of interest and settling of accounts which avoided the limitation, and a remit was required for the purpose of having, *inter alia* enquiry and adjudication on these matters of fact.

So standing the suit in the Court of Appeal, the Indian Limitation Act of the 7th August 1908, was passed. Its 31st Section is in these terms:—

"Notwithstanding anything contained in this Act or in the Indian Limi- "tation Act 1877, in the territories mentioned in the second schedule a suit for "foreclosure or a suit for sale by a mortgagee may be instituted within two "years from the date of passing of this Act, or within sixty years from the "date when the money secured by the mortgage became due, whichever period "expires first; and no such suit in the said territories instituted within the "said period of sixty years and pending at the date of passing of this Act, "either in a Court of First Instance or of Appeal, shall be dismissed on the "ground that a twelve years' rule of limitation is applicable.

"(2) Where in the aforesaid territories the claim of a mortgagee for "foreclosure or for sale has been wholly or in part dismissed or withdrawn after "the twenty-second day of July 1907 and before the passing of this Act, either "in a Court of First Instance or of appeal, on the ground the twelve years "rule of limitation applies to such claim, the case may be restored on an "application in writing to the Court by which the claim was dismissed or in "which it was withdrawn, provided the application is made within six months "from the date of the passing of this Act, and on such restoration the provisions "of sub-section (1) shall apply."

The question in the present appeal is simply, and in a word, whether this supervenient legislation applies to this suit. That it was meant so to apply is fairly obvious from the citation of the date the 22nd July 1907, which is in fact the date of delivery of the

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previous judgment of this Board. Whether it does in fact so apply depends, as was admitted by the learned Counsel for the Appellants, solely on whether the suit was or was not a suit pending at the passing of the Act.

Their Lordships do not entertain any doubt that it was. The former judgment of the Board did not end the suit; did not finally determine it. It was remitted to the High Court of Madras for further procedure, and for enquiry upon allegations of fact; and at the date of the Statute that procedure was not concluded and the enquiry had not indeed been entered upon. The suit in fact was neither adjugded upon nor even ready for judgment. Their Lordsdips express their concurrence with the opinions of the learned judges of the High Court, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Allahabad High Court.]

Present:—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Raja Balwant Singh ... ... *Appellant.**

v.

Rao Maharaj Singh ... ... *Respondent.*

Hindu Law—Joint family—Mortgage by the elder of two brothers as absolute owner and in his own behalf for discharging father's debts—Effect—Minority.

Balwant Singh v. Maharaj Singh.

A mortgage by the elder of two brothers, members of a Joint Hindu family, not in any respect as representing the younger brother of a joint Hindu family, but in his assumed position as the absolute owner of the estate is void and of no effect on the younger brother who was a minor at the time even though the mortgage was executed by the elder for the purpose of discharging debts incurred by their father; and the mortgage executed as it was by the elder only even though the younger was made a party thereto merely to make known his consent and approval to the loan being taken must be regarded as a mortgage deed to which the younger was not even an assenting party and one which did not affect him or his interest in the estate.

Consolidated appeals against the decree of the High Court for the North-West Provinces, Allahabad, dated 27th March 1906, which reversed (so far as it affected the respondents) the decree of the Subordinate Judge of Aligarh, dated 14th April 1903.

Mr. De Gruyther, K. C. and Mr. B. Dube for appellant.

Sir H. Erle Richards, K. C. and Mr. K. Brown for respondent.

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* 28th February 1912.

Balwant Singh v. Maharaj Singh.

Their Lordship's Judgment was delivered by

Sir John Edge:—These are two consolidated appeals from decrees of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 27th March 1906, which varied a decree of the Subordinate Judge of Aligarh, dated the 14th April 1903.

The suit in which these appeals have arisen was brought on the 26th September 1901, by the assignee of a mortgage to recover Rs. 5,67,978—8—0 principal and interest, claimed under the deed of mortgage. The mortgage deed, which is dated the 28th October 1892, purports to have been made between Raja Sheoraj Singh Bahadur mortgagor, of the first part, Maharaj Singh, the only brother of the said Raja Sheoraj Singh of the second part and the Bank of Upper India, Limited, of the third part. Sheoraj Singh and Maharaj Singh were with others, made defendants to the suit.

Sheoraj Singh was the sole mortgagor, and by the deed of mortgage, Sheoraj Singh, declaring that he was the absolute owner in possession of the several villages, lands, hereditaments, and premises in the deed mentioned, and that there was no sharer in the said property, purported to mortgage the property to the Bank of Upper India, Limited, as security for the repayment with interest of Rs. 3,00,000 lent to him by the Bank. Maharaj Singh was not a mortgagor, nor did it appear by the mortgage deed that he had any proprietary interest in the mortgaged property or was obtaining any benefit from the loan to his brother Sheoraj Singh; Maharaj Singh was made a party to the deed of mortgage in order that the fact of his having signed the deed might afford evidence that he had assented to the taking of the loan by Sheoraj Singh and the granting of the mortgage. The suit is one for sale of the property mentioned in the mortgage deed, and by the suit the plaintiff sought to make Maharaj Singh personally liable for the mortgage debt and interest, and to bring to sale Maharaj Singh's share in the mortgaged property, which in fact, was the ancestral property of the joint Hindu family which at the date of the mortgage consisted of Sheoraj Singh and Maharaj Singh. The mortgage was assigned on the 2nd August 1897 by the Bank of Upper India Limited, to Raja Balwant Singh, who was the plaintiff in the suit. Raja Balwant Singh is now dead, and his minor son Raja Surajpal Singh is represented in this litigation by the Collector of Etah, who is in charge of his estate.

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Sheoraj Singh, the mortgagor, is the elder of the two sons of Raja Shankar Singh, now dead. The younger of the two sons of Raja Shankar Singh is Maharaj Singh, a defendant in the suit and the respondent in one of these two appeals. Raja Shankar Singh was the only son of Raja Dilsukh Rai, long since dead. At the time of the Indian Mutiny of 1857–58, Dilsukh Rai who was then a patwari, did good and meritorious service for the Government. In recognition of those services the Government granted to Dilsukh Raja considerable estate, now said to produce annually some Rs. 50,000 gross income. The lands granted to Dilsukh Rai were not granted as an impartible estate. They are the lands which were mortgaged by Sheoraj Singh to the Bank of Upper India, Limited. In further recognition of his services the Government conferred upon Dilsukh Rai the title of Raja as a personal distinction. Raja Dilsukh Rai was a saving and apparently a penurious man. On his death the estate was unencumbered, and he left a large sum of money which he had accumulated. The Government also conferred upon Shankar Singh the title of Raja as a personal distinction. The title was never made hereditary, and although Sheoraj Singh was described in the mortgage deed as a Raja he was not entitled to be so described. Raja Shankar Singh borrowed considerable sums of money, and died on the 24th August 1891 leaving debts which he had contracted undischarged. It was to discharge those debts of Raja Shankar Singh, and also some debts which had been contracted by Sheoraj Singh, that the mortgage in which this suit has been brought was made by Sheoraj Singh.

Several issues were raised and tried in the Court of the Subordinate Judge. One of those issues arose on a defence of Maharaj Singh that at the date of the mortgage he was under the age of 18 years, and being at that date a minor was legally incapable of entering into any contract or of binding himself or his interest in the estate by his execution of the deed of mortgage as an assenting party to the taking of the loan and the granting of the mortgage by Sheoraj Singh. Another issue which was tried by the Subordinate Judge related to an alternative case which the plaintiff put forward, by which he sought to make Maharaj Singh and his interest in the estate liable for the payment of the money due under the mortgage, on the alleged ground that it was his duty as a Hindu son to pay with interest the money advanced by the Bank of Upper India, Limited, to Sheoraj Singh, as that money had been lent by the Bank to Sheoraj Singh to discharge the debts which had been contracted by Raja Shankar Singh and had been applied

by Sheoraj Singh to the discharge of those debts. On behalf of Maharaj Singh it was alleged in answer to the plaintiff's alternative case that Raja Shankar Singh had contracted those debts for the purpose of immorality, and it was consequently contended that there was no duty on his son to discharge them by payment, and the payment of those debts by Sheoraj Singh out of money lent to him by the Bank of Upper India, Limited for that purpose, created no liability on Maharaj Singh or his interest in the family estate.

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The Subordinate Judge found as a fact that at the date of the mortgage, 20th October 1892, Maharaj Singh was of full age and being apparently under the impression that in obtaining the loan from the Bank of Upper India, Limited, and in making the mortgage, Sheoraj Singh might be regarded as having acted as the manager of the joint Hindu family, the Subordinate Judge dealt with the plaintiff's alternative case and found that the debts which had been contracted by Raja Shankar Singh had been contracted for the purposes of immorality, and exempting certain portions of the property which were held by persons who are not parties to either of these appeals, made a decree for sale of the rest of the property mentioned in the deed of mortgage. With the portions of the property which were exempted from sale, these appeals are not concerned.

From that decree of the Subordinate Judge Maharaj Singh and another defendant, the Reverend J. B. Thômas, who is now represented by the Reverend Rockwell Clancy filed separate appeals in the High Court. The High Court on a careful and exhaustive review ot the evidence found as a fact that Maharaj Singh was a minor on the 28th October 1892, and consequently that the mortgage deed as against him and his interest in the estate was void. Although the High Court obviously considered that an inquiry into the origin and nature of the debts' which had been contracted by Raja Shankar Singh was irrelevant in this suit, the High Court reluctantly, and only in view of the question possibly becoming material in an appeal from their decree, carefully considered the evidence bearing on that question, and found as a fact that the debts which Raja Shankar Singh had contracted had been contracted by him for the purposes of immorality. The High Court allowed the appeal of Maharaj Singh, dismissed the suit so far as Maharaj Singh and his interests in the estate were concerned, and, by separate decree allowed the appeal of the Reverend J. B. Thomas to the extent of a moiety of the property claimed by him. From those decrees of the High Court these consolidated appeals have

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been brought. In support of the appeal in which the Reverend Rockwell Clancy is a respondent. No argument has been addressed to their Lordships to show that the appeal against the decree of the High Court which was passed in the appeal of the Reverend J. B, Thomas, could be supported if the appeal against the decree claimed by Maharaj Singh in the High Court should fail.

Some of the questions which had been considered in the Courts below were on behalf of the appellant argued at considerable length before this Board, and it was also contended on his behalf that in borrowing the Rs. 3,00,000 from the Bank of Upper India, Limited, and in making the mortgage of the 28th October 1892, Sheoraj Singh had acted as the manager of the family, and for the benefit and protection of the estate, and consequently, as it was urged, that it was immaterial whether Maharaj Singh was or was not of full age at the date of the mortgage. It will be convenient to deal with that contention at once. The contention that Sheoraj Singh had acted as the manager of the family in borrowing the Rs. 3,00,000, and in making the mortgage, is unfounded. Evidence, oral and documentary, which their Lordships accept as reliable, proves that Sheoraj Singh after the death of his father Raja Shankar Singh, assumed without authority the title of Raja and asserted that the family estate was impartible, and as an impartible estate had descended to him as the elder son of Raja Shankar Singh, and that his brother Maharaj Singh was entitled only to an allowance for maintenance. It was in that assumed position as the absolute owner of an impartible estate, and not as the manager of a joint Hindu family that he obtained the loan from the Bank of Upper India, Limited, and made the mortgage in favour of the Bank. The mortgage deed was drawn up by an official of the Bank, and in that deed Sheoraj Sing Bahadur, is described as Raja Sheoraj Singh Bahadur, mortgagor, and it is recited that:—

"The said mortgagor is the absolute owner or proprietor of the several "villages, lands, hereditaments, and premises hereinafter mentioned, and more "particularly described in the schedule hereto attached and intended to be "hereby mortgaged in possession free from all incumbrances save and except "being mortgaged and under attachment of decrees as mentioned hereinafter.. "and the said Maharaj Sing, brother of the said mortgagor has been made a "party to this indenture in order to make known his consent and approval to "this loan being taken. and the said villages, lands, hereditaments, and premi- "ses, being mortgaged as security for the same and the said mortgagor doth "hereby declare, that the said property is absolutely his own and he has full "power to alienate the same by a mortgage sale or otherwise, and that he has "only one brother, the said Maharaj Singh, and no sons or any sharer in the "said property."

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In face of that deed it cannot be contended that the Bank of Upper India, Limited, lent the money to Sheoraj Singh, or that Sheoraj Singh made the mortgage in favour of the Bank as manager of the joint Hindu family, which consisted of himself and Maharaj Singh. The Bank of Upper India, Limited, made some inefficient enquiries, and lent the Rs. 3,00,000 to Sheoraj Singh, not as the manager or even as a member of a joint Hindu family, but in his assumed position as the absolute owner of an impartible estate. Sheoraj Singh, on his own behalf and in his own interests, and not as representing Maharaj Singh, discharged the debts which Raja Shankar Singh had contracted. It need hardly be observed that Sheoraj Singh was not an ancestor or a predecessor of Maharaj Singh; he was at the date of the mortgage merely a co-sharer with his brother Maharaj Singh in the property of the joint Hindu family of which they were members.

The evidence on the question of Maharaj Singh's age on the 28th October 1892 is partly oral and partly documentary. According to the evidence, oral and documentary, which the High Court considered to be entirely reliable, Maharaj Singh was born on the 20th December 1874, and consequently was under the age of 18 years on the 28th October 1892. The Subordinate Judge had treated the oral evidence that Maharaj Singh had been born on the 28th October 1874, as the false evidence of perjured witnesses, and had treated the documentary evidence as fabricated on behalf of Maharaj Singh for the purposes of his defence to the suit. Before coming to the conclusion that Maharaj Singh was born on the 20th December 1874, the High Court, bearing in mind the adverse comments of the Subordinate Judge on that oral and documentary evidence, and with the object of ascertaining how far if at all, the comments and findings of the Subordinate Judge were justified, had carefully considered the oral evidence of the witnesses, and had examined the documents and papers which had been put in evidence. There was some other documentary evidence which standing alone and unexplained would suggest that Maharaj Singh had probably arrived at the full age of 18 years before the 28th October 1892.

The oral and documentary evidence upon which the High Court relied for their finding that Maharaj Sing was a minor when he signed the mortgage deed on the 28th October 1892, has been criticised minutely and at length by the learned Counsel who argued these appeals on behalf of the appellant, but their Lordships are unable to see any reason for doubting, on the question of the date of birth of Maharaj Singh, the evidence of Pandit Ganesh Ram,

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Pancham Ram, Jhamman Lal, Ram Prasad, Ganesha Ram the barber, and the defendant (respondent) Maharaj Singh. If the evidence of those witnesses is believed, Maharaj Singh was born on the 20th December 1874. The documentary evidence as to the date of birth of Maharaj Singh is in their Lordship's opinion not open to suspicion. Pandit Ganesh Ram proved that he prepared the *tewa* or abstract horoscope on the day when Maharaj Singh was born, and from it prepared the horoscope which was presented to Raja Dilsukh Raj on the day of the *Daston* ceremony. The *tewa* and the horoscope were put in evidence. The horoscope bears upon it in the writing of Raja Dilsukh Rai the name Maharaj Singh which Raja Dilsukh Rai gave to his grandson at the *Daston*. That horoscope was produced and examined on the occasion of the marriage of Maharaj Sing, and it has been clearly and amply identified as the original horoscope relating to the birth of Maharaj Singh. Ram Prasad, who with other Pandits was called in on the birth of Maharaj Singh to prepare a horoscope, produced the almanac in which at the time he had entered the birth of a son in the house of Kunwar Shankar Singh under the date 12th Aghan Sudi, Samvat 1931, which was the 20th December 1874. Ganesha, who was the family barber, took the news of the brith of a son of Shankar Singh from Bilram to Raja Dilsukh Rai at Etah, and received from him a present of Rs. 2, Ganesha also said in his evidence that on that occasion Raja Dilsukh Rai gave Rs. 50 to Balwant Singh for household expenses. The original accounts of the expenditure of Raja Dilsukh Rai, which according to the evidence bear his signature, on the occasions when he examined them show that in December 1874 Rs. 2 were given to Ganesha barber, who brought the news of the brith of a son in the house of Kunwar Shib, who was Raja Shankar Singh, and which show that Rs. 50 was sent to Bilram on account of the brith of a son in the house of Kunwar Sing, who was Raja Shankar Singh. Ganesha, the barber, proved that that son was Maharaj Singh; and there is no evidence to show that Raja Shankar Singh ever had more than two sons. Their Lordships cannot regard that oral and documentary evidence as false or even as open to suspicion. In their opinion it conclusively proves that Maharaj Singh was a minor when he signed the mortgage deed on the 28th October 1892. There is, however, documentary evidence that prior to the 28th October 1892 Maharaj Singh had acted as if he was of full age. For instance, on the 26th May 1892 Maharaj Singh signed a Vakalatnama appointing Muhammad Tahir Husain, a pleader, as his attorney in a suit in which he and

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Sheoraj Singh were defendants, and authorising Muhammad Tahir Husain to appear for him to file documentary evidence, and to refer the matter to arbitrators or to enter into a compromise. In that suit Sheoraj Singh, in his written statement of the 26th May 1892, made an allegation in reference to Section 444 of the Code of Civil Procedure which can be construed only as meaning that Maharaj Singh was at that date a minor. For another instance, in a suit in which Sheoraj Singh and Maharaj Singh were plaintiffs, they, on the 13th August 1892, signed a vakalatnama appointing Muhammad Tahir Husain, pleader, their attorney, and authorising him to act for them in the suit. On the other hand, on the 19th August 1892 a decree was made in a suit which had been instituted on the 14th July 1892, and in which Maharaj Singh had been treated throughout as a minor under the guardianship of his brother Sheoraj Singh. It is probable that until it became necessary in this suit to ascertain the actual date of the brith of Maharaj Singh, neither he nor Sheoraj Singh knew his precise age. However that may have been, their Lordships find as a fact on the clear and reliable evidence to which they have referred, that Maharaj Singh was a minor under the age of 18 years when he signed the mortgage deed of the 28th October 1892.

Having found as a fact that Maharaj Singh was a minor on the 28th October 1892 it is not necessary for their Lordships to consider any other issue. This suit has been brought on the mortgage deed of the 28th October 1892 by the assignee of that mortgage; and as their Lordships have held, that the mortgage was not made by Sheoraj Singh as the manager of the family, or in any respect as representing Maharaj Singh and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable, it was void and of no effect, and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage deed which did not affect him or his interest in the estate.

Their Lordships will humbly advise His Majesty that the decrees of the High Court be affirmed and these appeals be dismissed with costs.

Messrs. Pyke Parrott & Co., Solicitors for appellant.

Mr. D. Grant Solicitor for respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Raja Sri Sri Durga Prasad Singh ... ... *Appellant.**

v.

Braja Nath Bose and others ... ... *Respondents.*

Land Tenure—Right to Minerals—Suit by Zamindars for Mineral rights—Government not necessary party,

Raja Sri Sri Durga Prasad Singh v. Braja Nath Bose.

The Digwars in Manbhum have unlike the Ghatwals of Sarlet no right to the underlying minerals in their land and Government is not a necessary party to a suit by the Zamindar to establish his right to minerals. The Digwari tenure is similar to Ghatwali tenure. It was granted originally in consideration of the performance of military service, to which police duties were attached. The tenure is hereditary and inalienable. The Digwar is appointed by the Government and liable to be dismissed by it for misconduct. On dismissal, the next male heir, if fit for the office, is appointed.

Appeal from a judgment and decree of the High Court at Calcutta, dated the 18th day of March 1907, which set aside a decree of the Court of the Subordinate Judge of Manbhum, dated the 14th day of June 1904.

Sir Robert Finlay, K. C., Mr. G. E. A. Ross and J. M. Parik for appellant.

Mr. De Gruyther, K. C. and Mr. Dunne for respondents.

Their Lordships' Judgment was delivered by

Lord Macnaghten.—The suit out of which the present appeal arises was brought by the Zamindar of Pergunnah Tharia, a permanently settled estate, in order to establish his right to the minerals underlying Mouzah Tasra and Mouzah Rohrabund. The two Mauzahs are within his Zamindari. They are both held by the Digwar of Tasra on Digwari tenure at a fixed rent of Rs. 64 per annum payable to the Zamindar.

Digwari tenure is similar to Ghatwali tenure. It was granted originally in consideration of the performance of military service, to which police duties were attached. The tenure is hereditary and inalienable. The Digwar is appointed by the Government and liable to be dismissed by the Government for misconduct. On dismissal the next male heir, if fit for the office, is appointed.

In 1892 the Digwar of Tasra granted a perpetual lease of the Coal Mines underlying the two villages. The lease became vested

* 21st February 1912.

Raja Sri Sri Durga Prasad Singh v. Braja Nath Bose.

in the Tasra Coal Company, Limited. The Company took possession and raised and sold a large quantity of coal.

The Zamindar asked for a declaration of right, an account, and an injunction.

The Subordinate Judge of Manbhum gave judgment in favour of the Zamindar. On appeal to the Calcutta High Court that judgment was reversed and the suit was dismissed with costs.

The case was argued at considerable length in both the Courts below and fully discussed before this Board.

Two points, and two points only, were seriously argued. It was contended (1) that the Government ought to have been made a party to the suit, and that in the absence of the Government the suit was defective and ought to be dismissed, and (2) that the Digwar had a proprietary right in the underground minerals.

The High Court decided both points in favour of the defendants.

In their Lordships' opinion the Government is not a necessary or a proper party to this suit. Apparently the Government does not claim the minerals under permanently settled estates. However that may be, the Government has never claimed the minerals under the two Mouzahs or either of them, or put forward any claim inconsistent with the rights now asserted by the Zamindar. The rights of the Government, whatever they are, will not be prejudiced or affected by the result of a suit to which it is not a party.

The second point seems equally clear. The two Mouzahs are within the plaintiff's Zamindari. Both the courts below have so held. The permanent settlement was made with the Zamindar of Jharia. No separate settlement was made with the Digwar of Tasra, if there was a Digwar of Tasra at the date of the permanent settlement, which seems more than doubtful. No attempt was made to prove that the mineral rights now in question were vested in the Digwar before or at the time of the permanent settlement if the lands were then held on Digwar tenure. Nor is there the slightest evidence tending to show or to suggest that the Zamindar ever parted with his mineral rights to the Digwar. Mineral rights were vested in the Ghatwals of Pergunnah Sarlet in the North-Western part of the Berbhum Zamindari, but those Ghatwals paid their rent direct to the Government and in other respects they were in a very peculiar position. They were dealt with by Regulation XXIX of 1814. They obtained the right to lease the minerals by the Act No. 5 of 1859. With every respect to the learned Judges of the High Court no inference can be drawn from circumstances of their case that the Digwars in Manbhum had similar rights or powers.

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The learned Judges on appeal seem to have been misled by a decision of the High Court in the case of *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram Chakravarti,*[1] which was afterwards reversed by this Board, and is reported in *Hari Narayan Singh* v. *Sriram Chakravarti.*[2] There certain persons, called Goswamis or Gossains, priests of a Hindu idol to which a certain village had been assigned on a permanent debottar tenure at a small annual rent granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this tribunal that it must be presumed that the mineral rights remained in the Zamindar in the absence of proof that he had parted with them.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, and the decision of the High Court reversed with costs, and the decree of the learned Subordinate Judge restored.

The respondents will pay the costs of this appeal.

Mr. E. Dalgado, Solicitor for appellant.

Messrs. Burton Yeats and Hart, Solicitors for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Present :—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Jadu Lal Saha and others ... ... *Appellants**

v.

Maharani Janki Koer and others ... *Respondents.*

Jadu Lal Saha *v.* Maharani Janki Koer.

Pre-emption—Hindus in Behar—Formalities—Manager of Court of Wards —Joint liability to pay Government Revenue.

The right of pre-emption is enforceable in Berar irrespective of the persuasion of the parties concerned ; *Fakir Rawot* v. *Sheik Emansbukhsh*[3] referred to.

The Musalman Law inisists on the first formality technically called " the immediate demand " being observed by the pre-emptor or some one on his behalf immediately on receipt of news of the sale and secondly on the repetition of the demand with as little delay as possible under the circumstances in the presence of witnesses either before the vendor or vendee or on the premises. The manager of the pre-emptor's estate under the Court of Wards is competent, independently of S. 40 of the Bengal Court of Wards Act to observe the formalities on the pre-emptor's behalf. S. 40 itself fully clothes the manager with authority to observe the formalities without any necessity of subsequent adoption by the Court of Wards.

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1. (1905) I. L. R. 33 C. 54.

2. (1910) I. L. R. 37 C. 723.

* 20 March 1912.

3. (1862) B. L. R. F. B. Rulings 35.

A Mahal is a unit of property; it may consist of one village or of several villages; it may be owned by one or several proprietors who may have an interest in all or some of the villages comprised in the estate. Joint liability to the Government Revenue arises from the fact that the parties own undivided interests in the estates and the joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue authorities when the share so partitioned becomes a separate unit of property. Consequently, a person jointly liable to pay the Government Revenue due on a Mahal can claim to pre-empt.

Appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal affirming a judgment and decree of the Second Subordinate Judge of Mozufferpur.

K. Brown for appellants.

Mr. De Gruyther, K. C. (Mr. E. N. Eddis. with him) for respondents.

Their Lordships' judgment was delivered by

Mr. Ameer Ali:—The suit out of which this appeal arises was brought by the plaintiff (respondent) to establish her right of pre-emption in respect of certain undivided shares in a number of villages comprised in Mahal Motihari, situated in the district of Champaran.

The shares in question belonged to a Mahommedan lady named Barkatunissa, the first defendant to this action, who sold the same to the Sahu defendants, by a deed of sale, dated the 28th of July 1904. Barkatunissa owned an interest in 24 out of the 31 villages comprised in the Mahal, whilst the plaintiff possesses shares in 18. The vendees had admittedly no proprietary interest in Mahal Motihari prior to their purchase from Barkatunnissa.

The plaintiff claims that as a co-sharer in the Mahal she is entitled to the right of pre-emption in respect of the shares sold to the Sahus by the first defendant.

Champaran appears to have been part of the Civil Division of Saran until sometime after the institution of the suit. The action was accordingly brought in the Court of the Subordinate Judge of Saran, but owing to the subsequent amalgamation of Champaran with Tirhoot, it was tried before the Subordinate Judge of Mozzufferpur (the Sudder Station of Tirhoot) who decreed the plaintiff's claim. This decree has been affirmed by the High Court of Bengal.

It has been urged on behalf of the appellants that as the right claimed is a creation of the Mussulman law and it is not proved that the Mussulman law of pre-emption is in force among the Hindus of the district of Champaran, both the pre-emptor and the vendees being Hindus, the action must fail.

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The suit was instituted on the 7th of March 1905, the Sahu defendants filed their defence on the 16th of June, and issues for trial were settled on the 27th of September 1905. It was not, however, until the 11th of July 1906, when, as the learned Judges of the High Court observe, "the suit was ripe for hearing," that the Sahu defendants for the first time raised a question as to the existence of the right of pre-emption among the Hindus of Champaran. Both the Courts in India have, in their Lordship's judgment rightly overruled the defendants' objection.

The law of pre-emption, under which the plaintiff claims the right, was introduced into India with the Mahommedan Government. The Province of Behar, to which the District of Champaran appertains, was an integral part of the Mahommedan Empire and consequently it would not be surprising to find that in Behar the right of pre-emption is enforcible irrespective of the persuasion of the parties concerned.

In the case of *Fakir Rawot* v. *Sheik Emansbukhsh*[1] a Full Bench of the High Court of Bengal gave judicial recognition to the existence of the pre-emption among the Hindus of Behar. In delivering the judgment the Chief Justice (Sir Barnes Peacock) reviewed the earlier cases bearing on the subject, and held that :—

"....a right or custom of pre-emption is recognised as prevailing among "Hindus in Behar, and some other provinces of Western India; that in districts "where its existence has not been judicially noticed, the custom will be a matter "to be proved; that such custom when it exists, must be presumed to be "founded on and co-extensive with the Mahomedan law upon the subject, unless "the contrary be shown; that the Court may, as between Hindus, administer a "modification of that law as to the circumstances under which the right may "be claimed, when it is shown that the custom in that respect does not go the "whole length of the Mahomedan law of pre-emption, but that the assertion of "the right by suit must always be preceded by an observance of the pre-"liminary forms prescribed in the Mahomedan law, which forms appear to have "been invariably observed and insisted on through the whole of the cases from "the earliest times of which we have record."

In their Lordships' judgment the decision on *Fakir Rawot's*[1] case is conclusive on the point raised on behalf of the defendants. Their abstention from taking the objection in a definite and distinct form at the earliest stage of the case was, it may fairly be presumed, due to the explicit enunciation of the law in the ruling referred to.

It has also been contended that the formalities insisted upon by the Mussulman law as essential preliminaries to the assertion of

1. (1863) B. L. R. F. B. Rulings 35.

Jadu Lal Saha v. Maharani Janki Koer.

the right, could not be performed by the manager of the plaintiff's estate appointed by the Court of Wards.

It appears that the plaintiff is a "disqualified proprietor under the Court of Wards Act (Bengal Act IX of 1871), having been declared to be incompetent to manage her property and her estate is in the charge of the Court of Wards. Section 40 of the Act which defines the general duty of manager appointed by the Court of wards provides that he "shall manage the property committed to him "diligently and faithfully for the benefit of the proprietor, and shall in every respect act to the best of his judgment for the ward's interest as if the property were his own."

The Mussulman law insists that the first formality technically, called "the immediate demand" should be observed by the pre-emptor or some one on his behalf immediately on receipt of the news of the sale, otherwise the right of pre-emption falls to the ground. The second formality consists in the repetition of the "demand" with as little delay as possible under the circumstances, in the presence of witnesses either before the vendor or the vendee or on the premises. The Courts in India have found that the ceremonies were duly performed by the manager in accordance with the prescriptions of the law. Had he failed in performing either of the ceremonies, he would have caused irreparable loss to the plaintiff as her right would have been absolutely defeated by his laches. In their Lordships' opinion Mr. Lowis, as manager of the plaintiffs' estate, was competent, independently of the provisions of Section 40 of the Court of Wards Act, to observe the formalities on her behalf. The section, however, which defines his duties appears to their Lordships to fully clothe him with authority to act as he did; the validity of his action, therefore, did not depend on its subsequent adoption by the Court of Wards. In this view the English cases cited at the bar have no application to the present case.

It was also urged that the claim to co-parcenary, on which the plaintiffs' right of pre-emption was based, arose out of the fact that the vendor and pre-emptor were jointly liable for the payment of the Government revenue assessed on the villages comprised in the Mahal, and that this joint liability does not constitute the co-parcenary contemplated by the Mahommedan law. This argument seems to proceed on a misconception of the land system of India. A Mahal is a unit of property; it may consist of one village or of several villages; it may be owned by one or several proprietors who may have an interest in all or some of the villages comprised in the

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estate. Their joint liability for the Government revenue arises from the fact that they own undivided interests in the property; and that joint liability does not cease in the case of any co-sharer until his particular share has been partitioned by the Revenue authorities, when the share so partitioned becomes a separate unit of property.

On the whole their Lordships are of opinion that the decree of the High Court should be affirmed, and this appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Messrs. T. L. Wilson & Co., Solicitors for appellants.

Messrs. Sanderson, Adkin, Lee and Eddis for respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Fort William in Bengal.]

Present.—Lord Macnaghten, Lord Atkinson, Lord Shaw, Sir John Edge, and Mr. Ameer Ali.

Loftus Otway Clarke ... ... *Appellant.*

v.

Brojendra Kissore Roy Chowdhry ... ... *Respondent.*

Loftus Otway Chorke ... ... *Appellant.*

v.

Srimati Biseswari Debi Chowdhurani ... *Respondent.*

Clarke v. Brojendra Kissore Roy Chowdhry.

Cr. P. C., Ss. 96, 105, Sch. II Form "Court"—Judicial Officers' Protection Act—Arms Act S. 25.

The word "Court" in S. 96, Cr. P. C. includes a Magistrate, and a Magistrate is perfectly within his jurisdiction in directing a search to be made in his presence in view of any inquiry about to be made by him.

Obiter. When a Magistrate directs a general search of a house in view of an inquiry under the Criminal Procedure Code, in discharge of his judicial functions, he may well appeal for protection under Act XVIII of 1850.

In order that a Magistrate may plead S. 25 of the Arms Act in defence to an action for damages for trespass of plaintiff's house the preliminary conditions prescribed by the Act should have been complied with.

Erle Richards, K. C. and Kenworthy Brown for appellant.

De Gruyther and J. M. Parikh for respondent.

Judgment.—Lord Macnaghten, in delivering their Lordships' judgment said:—The pecuniary amount involved in this appeal is comparatively trifling. But the case is one of grave importance, and their Lordships are compelled to add that, in their opinion, there has been a serious miscarriage of justice, in both the Courts which dealt with the matter in India.

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* 18th June 1912.

Clarke v. Brojendra Kissore Roy Chowdhry.

In April, 1907, Mr. Clarke, the appellant, was the District Magistrate of Mymensingh, an extensive district in the Province of Bengal. The principal suit, the result of which governs this consolidated appeal, was brought by the first respondent, as plaintiff, claiming damages for trespass on the allegation that Mr. Clarke had illegally and wantonly searched his cutcherry, and that Mr. Clarke had not only acted illegally, but that he had acted out of personal malice and ill-will. The suit originally brought in the Court of the third Subordinate Judge of Mymensingh was transferred, at the plaintiff's instance, to the High Court in its extraordinary original civil jurisdiction. It was tried by Mr. Justice Fletcher. He found in favour of the plaintiff and gave a decree for Rs. 500, but without costs. Costs were not awarded to the successful plaintiff on account of the charge of personal misconduct, which his Lordship held to be unfounded and grossly improper. Mr. Clarke appealed to the High Court in its appellate jurisdiction. The plaintiff filed cross-objections reiterating his charge of personal misconduct. The Court of Appeal, consisting of the late Chief Justice and Mr. Justice Harington (Mr. Justice Brett dissenting) dismissed the appeal but without costs. The result is that a Magistrate placed in a very difficult position and called upon to act on a sudden emergency has been adjudged guilty of trespass and subjected to a fine, though he seems to have acted properly, with courage and good sense, and strictly in accordance with the powers committed to him.

The facts of the case are not really in dispute. Jamalpur is a sub-division of Mymensingh. The Zemindars in that part of the country are Hindus, most of them, apparently, absentees living in Calcutta. The bulk of the population is Mahomedan. For some time before the occurrence which led to this suit, owing, it was said, to the measure known as the Partition of Bengal, there had been a good deal of disaffection and excitement in the district, and the relations between the Hindus and the Mahomedans were dangerously strained. On April 21, 1907, there was a large fair or Mela held at Jamalpur. Some Hindus, apparently at the instance of the servants and agents of the plaintiff and his co-sharers known collectively as the Gouruckpur *Zemindars*, tried to prevent the sale of bideshi, or foreign goods. The Mahomedans resented this attempt. There were serious disturbances out of which there sprang up a bitter feeling between the Hindus and the Mahomedans.

On the evening of April 27, some Hindus dressed or supposed to be dressed in Mahomedan fashion were observed wandering about the

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town. They were followed by a band of Mahomedans. The Hindus turned on the men following them and fired three or four revolver shots and a Mahomedan was wounded. An uproar followed. Mr. Barniville, the Sub-divisional Magistrate of Jamalpur, and Mr. Luffman, the District Superintendent of Police, who were then in the Dak bungalow, hastened to the scene of disturbance. They met some Mahomedans carrying away the wounded man, and they received information that the persons who had committed this offence had fled in the direction of the cutcherries of the Gouruckpur Zemindars. These cutcherries appear to be close together in an open piece of ground. Hard by is a temple of Thakurain Doya Moyee. An excited crowd of Mahomedans was collected there apparently bent on attacking the cutcherries. The Sub-Divisional Magistrate and the District Superintendent of Police found 40 or 50 men armed with lathies. After they had disarmed them they were told that armed men were concealed in the temple. They went there. They found the doors locked and were refused admittance. The Sub-Divisional Magistrate ordered the persons inside, to open the doors, assuring them of protection. In response several shots were fired from inside, and a man was wounded slightly. The two officers then withdrew after dispersing the Mahomedan crowd outside.

The Sub-Divisional Magistrate wired at once to the Commissioner of the division, and the District Superintendent of Police sent a telegram to Mr. Clarke to the following effect:—"Serious riot just averted, come at once." Mr. Clarke received this telegram at 2 on the morning of April 28. He started for Jamalpur by the first train, and arrived there at 10 A. M. On his arrival he found the following telegram from the Commissioner headed "Urgent":— "Barniville has wired for available armed police by special train, saying serious disturbance impending. What do you know? Can you send Gurkhas from Mymensingh to be replaced if required by men from here?—Dacca.

Mr. Clarke, who had spent most of this time after the Mela disturbance between Jamalpur and Mymensingh, and knew the state of feeling in the district, took counsel with the Superintendent of Police and the Sub-Divisional Magistrate. From what he knew himself he came to the conclusion that it was his duty to search the cutcherries. And accordingly he did so, accompanied by the Sub-Divisional Magistrate, the police officer, and a force of police. The plaintiff's cutcherry was found locked. It seems that the jamadar in charge of the building had locked it up and left at 1 P.M.

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There was no one on the ground to open the doors. So the doors were forced open. Boxes in the cutcherry were also opened and their contents taken out. The actual search within the building was made by the police, but Mr. Clarke had charge and direction of the whole proceedings. He remained outside. There was nothing of an incriminating nature found in the cutcherries.

The question and the only question in this appeal, is whether Mr. Clarke was authorized by law to make the search. That depends on the provisions of the Code of Criminal Procedure and on nothing else. It cannot be denied that a serious offence had been committed against the public tranquility and that under the Code of Criminal Procedure (which defines offences against the public tranquility and is summarized in Chapter VIII of Schedule II of the Code) every member of the unlawful assembly from which the shots proceeded was equally guilty of the offence. Nor can it be disputed that it was the duty of the District Magistrate to enquire into that offence.

Now Section 177 of the Code provides that every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. Mr. Clarke, by virtue of his superior rank, superseded the Sub-Divisional Magistrate of Jamalpur, had properly resumed jurisdiction there.

An inquiry under the Code is a proceeding distinct from a trial. There is no definition of the word "inquiry" in the interpretation Clause, Section 4. But there is this explanation of the term as used in the Code:—(k) Inquiry includes every inquiry other than a trial conducted under this Code by a Magistrate or Court. Section 36 is in the following terms:—"All District Magistrates, Sub-Divisional Magistrates, and Magistrates of the, first, second, and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their "ordinary powers." Schedule III, referring back to Section 36 defines the "ordinary powers" of Provincial Magistrates beginning with Magistrates of the third class. Every Magistrate of a higher class is invested with all the "ordinary powers" of a Magistrate of the class immediately below that to which he belongs, with further powers appertaining to Magistrates of his own grade.

Among the "ordinary powers" of a Magistrate of the third class specified in Schedule III, is,—"(8) Power to issue search warrants. Section 96." In Section 96. the following provision occurs:—"Where the Court considers that the purpose of any inquiry, trial, or other proceeding under this Code will be served by

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a general search or inspection it may issue a search warrant." Then Section 105 provides as follows:—"Any Magistrate may direct search to be made in his presence of any place for the search of which he is competent to issue a search warrant." It seems clear from these Sections and Schedule III. that Mr. Clarke was authorized by the Code to direct a search of the plaintiff's cutcherry in his presence if he considered it advisable to do so.

Now the learned trial Judge disposes of Mr. Clarke's defence in rather a summary manner. Beyond referring to Section 105 he does not consider or refer to any one of the Sections on which the defence is based, nor does he deal with Schedule III at all. All that the learned Judge says on this part of the case is this:—It is obvious in the present case the defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code. The defendant was not acting as a Court within the meaning of Sec. 94 of the Criminal Procedure Code as there was no proceeding pending before him."

On appeal the late Chief Justice and Mr. Justice Harington took the same view, and dealt with the matter much in the same way. After citing Section 102 the learned Chief Justice proceeds as follows:—" The Magistrate can only act under this Section where he is competent to issue a search warrant. That takes us to Section 6. That section applies to the issue of search warrant by the Court. Here the defendant was not acting as a Court, and all that Section 105 enacts is that instead of the Court issuing a search warrant the magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate, but the Section does not assist the present defendant." And the opinion of Mr. Justice Harington is to the same effect. He says:—" In my opinion, Sec. 96 only authorises the Magistrate to issue a search warrant when sitting as a Court *i. e.*, when some proceeding under the Code has been initiated before him. And this view is strengthened by the form of the search warrant given in Sch. V, which recites that information has been laid or complaint has been made." If his Lordship had read to the end of the form in Schedule V, he would have seen that it disposes of his theory altogether. The form contemplates the issue of a search warrant before any proceedings of any kind are initiated and in view of an "inquiry about to be made."

It would seem that the trial Judge and both the learned Judges who formed the majority of the Court of Appeal were misled by the use of the word "Court" in Section 96. For the sake of brevity the Code uses the terms "Court" and "Magistrate" generally

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if not always as convertible terms. Sec. 6 headed "Classes of Criminal Courts" enacts that:—"Besides the High Courts and the Courts constituted under any Law under this Code for the time being in force there shall be five-classes of criminal courts in British India,namely, 1. Courts of Session, 2. Presidency Magistrates, 3. Magistrates of the First Class, 4. Magistrates of the Second Class, 5. Magistrates of the Third Class." The ordinary powers of all Provincial Magistrates are declared to be those "hereinafter conferred upon them and specified in the third schedule." That means: conferred upon them by the Act and specified in the third schedule to the Act. As appears by the schedule the power to issue search warrants is specified among the 'ordinary powers' of all Provincial Magistrates, but the only Section conferring the power is Section 96, to which the schedule itself refers.

It seems to their Lordships therefore clear that what Mr. Clarke did was warranted by the Code. If that be so here is an end of the case.

Two other points were discussed by the trial Judge and the learned Judges of Appeal at much greater length than the ground on which the real defence to the action was based. It seems that the defendant or his advisors, not content with relying on the Code of Criminal Procedure, unwisely perhaps prayed in aid Section 25 of the Indian Arms Act, 1878, and also Act No. XVIII of 1850 entitled "An Act for the Protection of Judicial Officers." The one seems inapplicable; the other in the present case wholly unnecessary. Their Lordships are disposed to agree with the majority of the Court of appeal that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute. On the other hand they have no doubt that Mr. Clarke in directing a general search of the plaintiff's cutcherry in view of an inquiry under the Code of Criminal Procedure was acting in the discharge of his judicial functions, and they think that if it had been necessary he might have appealed for protection to the Act No. XVIII of 1850.

Their Lordships think that there was no foundation for the suit. Mr. Clarke's action under the circumstances was quite justified. The charge of personal misconduct advanced and reiterated without any shadow of proof deserves the severest reprobation. Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed, the order of the Court of Appeal discharged, and the suit dismissed with costs in both Courts. The respondent must pay the costs of the appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present:—Lord Macnaghten, Lord Atkinson, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Brij Lal and others ... ... *Appellant.**

v.

Subraj Bikram Singh ... ... *Respondent.*

Brij Lal *v.* Subraj Bikram Singh.

Hindu Law—Will—Construction—"Heir.

A will ran as follows. "After my demise my wife legatee No. 1 will remain in possession of the property with all sorts of powers like myself, and after the death of my wife, my daughter-in-law, legatee No. 2, will remain in possession and occupation of the property just like myself and legatee No. 1 and thereafter (*i.e.*, after the daughter-in-law's death.) she will have power to nominate any-one whom she thinks fit as an heir.'

Held on the construction of the will that the word "heir" meant heir to the testator and that the daughter-in-law did not take an absolute estate in the property devised.

Two consolidated Appeals from two decrees of the Court of the Judicial Commissioner of Oudh, reversing two decrees of the Subordinate Judge of Iahsil Biswan.

Kenworthy Brown, for appellants.

De Gruyther, K. C., and *G. E. A. Ross*, for respondent, were not heard.

The Judgment of their Lordships was delivered by

Lord Macnaghten:—This is a very simple case. The only question is whether the daughter-in-law took an absolute estate or an estate for life?

In the first place, there is no estate at all given to the lady, in terms. The only direction is that she is to remain in possession and occupation of the property, and then she is invested with the power of appointing an heir either in her lifetime or by will. It seems to their Lordships that the word 'heir' in that clause means heir to the testator and that the judgment of the Judicial Commissioners is perfectly right.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be dismissed, and with costs.

L. T. Wilson & Co., Solicitors for the appellants.

Rogers and Nevill, Solicitors for the respondents.

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* 2nd May 1912.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.) S. C. 13 Cr. L. J. 275

Present:—Sir Charles Arnold White, KT., *Chief Justice*, Mr. Justice Sankaran Nair, and Mr. Justice Ayling.*

17 CWN 297 (dis.)

Potaraju Venkata Reddy ... *Petitioner.* (*Accused in C. C. No. 1 of 1911 on the file of the Joint Magistrate's Court of Godavari*).

v.

Emperor ... ...

Potaraju Venkata Reddy v. Emperor.

Penal Code Ss. 499, 500—Defamation—Privilege—Accused's status—Statute—Construction—Penal Code—State of English Law to be considered when ?

The statement of a person charged with an offence in answer to a question by the Court trying him "What have you to say" is an absolutely privileged statement so as to make him not to liable to be punished for defamation under the Indian Penal Code. The privilege is not merely a qualified privilege *i. e.*, it is not subject to the condition that it should be made in good faith.

Opinion of *Richards*, J. in *Emperor* v. *Ganga Prasad*[1] approved.

The law of defamation as laid down in S. 499, Penal Code does not exclude the application of the doctrine of absolute privilege from the law of defamation in India.

The canon of interpretation of statutes laid down by *Lord Herschell* in *Bank of England* v. *Vagliano Brothers*[2] is not applicable to the interpretation of statutes like the Indian Penal Code which do not, like the Bill of Exchange Act, codify the law but create new law; and consequently Courts are warranted in taking into consideration what the law of England was at the time the Indian enactment was passed.

Petition under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Judgment of the Court of the Joint Magistrate of Godavari in C. C. No. 1 of 1911.

This case coming on for hearing before Mr. Justice Spencer when his Lordship made the following.

ORDER †.

The petitioner was accused in a case of hurt brought against him on the complaint of a relative. At the close of the examination of the accused he caught one of the prosecution witnesses by the arm and dragging him before the Magistrate declared that he was a rogue and a forgerer. The Joint Magistrate of Godavari, who tried the case of defamation arising out of these words, has found that the expressions were part and parcel of the accused's defence statement, or in other words, that they were made in the course of

Cr. R. C. No. 216 of 1911. Cr. R. P. No. 166 of 1911.
* 10th October 1911. † 15th March. 1912.
1. (1907) I. L. R. 29 A. 685. 2. (1891) A. C. 107 at 145.

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a legal proceeding. He has also found a want of good faith. These findings may be accepted. On them the petitioner has been convicted and fined Rs. 20 for an offence, under section 500, I. P. C.

The learned vakil who appears for the petitioner in the Revision Petition claims "absolute privilege" for this statement on the strength of the rule of English Law that "no action of libel or slander lies whether against Judges, Counsel or witnesses or parties for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law." He maintains that this principle has been applied so far as this Presidency is concerned to the case of Judges, Counsel, witnesses and accused.

If the course of decisions in this Presidency had been quite uniform, I should feel bound to follow it in spite of my own opinion that the principle laid down in *Emperor* v. *Ganga Prasad*,[1] is the correct one. Knox, C. J., observed there "it appears to me that since the Code was enacted, the question is one which has to be decided by the Indian Penal Code and by the Evidence Act of 1872, and not by any maxim, however excellent that maxim, may be, which has been universally recognised in England, but has not obtained universal recognition in this country, unless indeed it can be shown beyond room for reasonable doubt that the question was never considered in either Code." He proceeded to discuss the bearing of section 105 of the Evidence Act on the exceptions to section 499 of the I. P. C. It seems monstrous that an accused person, just because he happens to occupy the position of an accused, should be entitled to utter any malicious untruths that may come into his head and so wantonly defame the complainant's character. The common instance may be given, so far as my experience extends in this Presidency, of an accused person alleging without good faith that his prosecution is due to his having enjoyed immoral intimacy with one of complainant's female relations. A blackguardly attempt to besmirch the honour of a family in retaliation for an honest prosecution ought to be punishable at law and according to the Indian Penal Code it is. But in this Presidency the decisions are not all one way, so far at least as accused persons are concerned.

The case of *Hayes* v. *Christian*,[2] may be briefly passed over as it was found there that the accused did not use the words complained of in the *ordinary course* of any legal proceeding. The case of *Hinde* v. *Bandry*,[3] can easily be distinguished because

1. (1907) I. L. R. 29 A. 685 at p. 696. 2. (1892) I. L. R. 15 M. 414.
3. (1876) I. L. R. 2 M. 13.

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the defendants were found to be entitled "to the qualified privilege of persons acting in good faith and making communications with a fair and reasonable purpose of protecting their own interest." The Court implied that the result would have been different if the defendants had used the occasion 'for the gratification of private ill-will.' In Criminal Revision Case No. 76 of 1899 (printed at page 589 of Weir, Vol. 1) Moore J., laid down what appears to me to be the correct principle that the case of a party to a criminal proceeding, who is prosecuted criminally for defamation in connection with statements made by him as such, must be dealt with under the principles laid down in the I. P. C.

Subrahmania Aiyar, J., who sat with him, found it difficult to reconcile this view with the *ratio decidendi* of *Manjaya* v. *Sesha Shetti.*[1] But he ultimately decided to uphold the conviction on the ground that the prisoner's statement (that the grandfather once kept the complainant's wife as his concubine) was false and malicious and therefore the ends of justice did not call for the High Court's interference. That case stands on a similar footing with the present as regards the facts. Now the policy which determined the decision of *Manjaya* v. *Sesha Shetti,* is intelligible. It is that witnesses should not be exposed to the fear of prosecution except for perjury. The same reasoning will apply to the case of persons examined by the police in the course of a criminal investigation under Section 161, Crl. P. C. for if they do not tell the truth they are liable to prosecution for giving false information to a public servant (Sec. 182, I. P. C.)—*Vide Queen-Empress* v. *Govinda Pillai.*[2] So also with parties to civil suits who like witnesses may be prosecuted for giving false evidence, if they speak falsely—*vide In the matter of Alraja Naidu.*[3] The case of Counsel has to be specially considered, for as observed by the Master of the Rolls in *Munster* v. *Lamb,*[4] "if any one needs to be free of all fear in the performance of his arduous duty an Advocate is that person."—*Vide Sullivan* v. *Norton.*[5] Public policy demands also that Judges should be protected from the consequences even of words uttered by them "falsely, maliciously and without reasonable cause," as it is for the benefit of the public that they should discharge their functions without favour and without fear *vide Raman Nair* v. *Subramania Aiyan.*[6] But it is not for the benefit of the public that accused persons should be permitted to slander their accusers with impunity, and as pointed out by Moore, J., in

1. (1888) I. L. R. 11 M. 477.
2. (1892) I. L. R. 16 M. 235.
3. (1906) I. L. R. 30 M. 222.
4. 11 Q. B. D. 588.
5. (1887) I. L. R. 10 M. 28.
6. (1893) I. L. R. 17 M. 87.

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the case reported in Weir, Vol. I, page 589, already quoted, they cannot be prosecuted for giving false and defamatory statements while under examination, under the law as it stands at present in India.

In the case of *In Re. Govindappa*[1], the provisions of section 499, I. P. C. were applied and the statements were found to have been made in good faith for the protection of the interests of the persons making them. In the case of *Murugesa Pillai* v. *Pujathi Ammal*,[2] the statement of the Counsel that he had kept the complainant as his concubine was found to be true and relevant as showing the motive for the complaint. In the present case the accused's statement that the witness was a rogue and forgerer might have been relevant, if true, but no attempt was made to prove it to be true, and the defence at the trial of defamation was a denial of having made it.

In dealing with the present Revision Petition I should be inclined to follow the law as laid down by Moore, J., in Weir, Vol. I, page 589, in dealing with the statements of an accused person, but I cannot shut my eyes to the fact that there has been a general tendency in this High Court to apply the principle of English Law of 'absolute privilege' freely to all parties whether they are parties to civil or criminal cases, with the exception of that one case, and in that case Subrahmania Aiyar, J., was inclined to dissent from the view of Moore, J. In this connection I may refer to two recent unreported cases (S. A. No. 250 of 1906) [*Pachaiperumal Chettiar* v. *Dasi Thangam*,[3]] and Cr. R. C. No. 295 of 1908, which applied the English rule to accused persons and to parties generally rather than the provisions of the Penal Code and the Evidence Act. It is also stated in Gour's Penal Law of India, para. 4174, page 2129, that statements of Judges, Counsel and parties, even though they be not made in good faith, are according to the view of the Courts at Calcutta, Madras and Bombay protected because they are made before a Judge while according to the Courts of Allahabad and the Punjab such statements possess no special immunity but must be judged by the ordinary standard of other privileged statements. If this is correctly stated to be the general trend of decisions of the Madras High Court, I feel some doubt if I can follow Moore, J., in the above ruling and I therefore direct the case to be placed before a Bench of two Judges of this Court. I may add that as regards other High Courts the decisions are not so uniform as the above

1. (1884) I. L. R. 7 M. 36.
2. 1 Weir 612.
3. (1908) I. L. R. 31 M. 400.

extract from Mr. Gour's book would lead one to suppose. For instance in *Augada Ram Shaha* v. *Nemai Chand Shaha*,[1] the theory of qualified privilege judged by the Indian Penal Code is laid down for statements of parties but in *Golap Jan.* v. *Bhola Nath Khetry*[2] absolute privilege is considered to be their right.

In accordance with the above order, this case coming on for hearing on Friday, the 12th day of October 1911, before Sundara Aiyar and Phillips, JJ., the Court made the following.

Order of Reference to a Full Bench:—The order of Spencer, J., directing the case to be posted before a Bench of two judges cites the principal cases on the point arising for decision in this case, namely, whether the statement of a person charged with an offence, when asked by the Court what he had to say, is an absolutely privileged statement so as to absolve him from liability to be punished for an offence, under section 499, Indian Penal Code. There is much conflict of authority on the point. The question is one of considerable importance and likely to arise frequently. We, therefore, consider it desirable that it should be decided by a Full Bench, and accordingly refer the following question:—

Is the statement of a person charged with an offence in answer to a question by the Court trying him, "What have you to say," an absolutely privileged statement so as to make him not liable to be punished for an offence, under section 499, Indian Penal Code, in respect of the statement ?

B. Narasimha Rau for petitioner.

J. L. Rozario, Ag. Public Prosecutor for respondent.

B. Narasimha Rau. Under the English law it is clear that this is a matter of absolute privilege. See *Odgers* on Libel and Slander p. 230. The doctrine is based upon Public Policy applicable even to India. S. 499 I. P. C. is not exhaustive, the exceptions and illustrations just cover the five groups of qualified privilege found in English Text Books and do not touch the case of absolute privilege. It is not likely that the framers of the Indian Penal Code would have omitted all reference to it if they had wanted to exclude this well-known heading of absolute privilege; Vide *Gunnesh Dutt* v. *Mangue Ram*[3]. All the Madras authorities beginning from *Manjaya* v. *Sesha Shetti*[4] are in my favour. The Bombay Court is also similarly inclined. See *Queen Empress* v. *Nagarjee Tri-*

1. (1896) I. L. R. 23 C. 867.
2. (1911) 15 C. W. N. 917.
3. (1872) 11 B. L. R. 321 (P. C.)
4. (1888) I. L. R. 11 M, 477.

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komjee,[1] The Calcutta and Allahabad Court are against this view. Vide *Woolfun Bibe* v. *Jesarat Shaik*[2] and *Emperor* v. *Ganga Prasad*[3] where all the authorities are collected.

J. L. Rosario referred to sections 2 and 77 I. P. C. S. 132 of the Evidence Act and said that the framers of the Indian Penal Code have made provision in the exceptions to section 499 whenever they wanted to give protection and he relied upon the arguments of Chief Justice Knox in *Emperor* v. *Ganga Prasad*.[3]

OPINION:—

Chief Justice.—The question which has been referred to us is this——"Is the statement of a person charged with an offence in answer to a question by the Court trying him 'What have you to say,' an absolutely privileged statement so as to make him not liable to be punished for an offence under section 499, Indian Penal Code, in respect of the statement?" There can be no question that under the law of England the occasion would have been absolutely privileged. Mr. Rosario, who argued in support of the view that under the law of this country the statement was not privileged unless the prisoner could show that it was made in good faith within the meaning of the 9th exception to section 499 of the Indian Penal Code, has conceded this. The law of England is that there are occasions when it is for the public interest that persons should not be in any way fettered in their statements; in this case the privilege is absolute and no action lies for words spoken. The occasions are (1) Parliamentary Proceedings, (2) Judicial Proceedings and (3) Naval and military affairs, and the affairs of State generally. See Odgers on 'Libel and Slander' 5th Edition, page 230.

With regard to the absolute privilege in the case of judicial proceedings under the English law, I need only refer to the leading case of *Dawkins* v. *Lord Rokeby*,[4] and the judgment of Lopes, L. J. in *Royal Aquarium* v. *Parkinson*.[5] The Lord Justice said 'The authorities establish beyond all question this—that neither party, witness, counsel, Jury nor Judge can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies, whether against Judges, counsel, witnesses or parties for words written or spoken in the course of any proceeding before a court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse and from personal ill-will and anger against the person defamed."

1. (1894) I. L. R. 19 B. 340
2. (1890) I. L. R. 27 C. 262.
3. (1907) I. L. R. 29 A. 685.
4. (1875) 7 H. L. 744.
5. (1892) 1 Q. B. 450.

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The question we have to determine is whether this Common law doctrine of absolute privilege is part of the law of this country, or whether on the true construction of section 499, Indian Penal Code, the law of defamation as laid down in that section excludes the application of this doctrine. The contention in support of the latter view was that the law of defamation, so far as this country was concerned, was created by section 499, and inasmuch as that section contains no reference to this English Common law doctrine of absolute privilege, it should be inferred that it was the intention of the legislature that it should form no part of the law of this country. In my opinion, it does not necessarily follow that, because this doctrine is not expressly recognised in the section, it was the intention of the legislature to exclude its application from the law of this country. The provisions of the Indian Penal Code and also those of the Evidence Act of 1872 are mainly based upon the English law and it is to be observed that, whenever the legislature in this country intended to depart from the English law, they made their intention clear by express enactment. As regards the Evidence Act, I may refer to section 132 and section 167. As regards section 499 of the Penal Code, the legislature has made it clear, by express enactment, that in certain respects they intended to depart from the English law of libel and slander. For instance, under the Penal Code, slander of a private person is a criminal offence: it is not so in England. It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English law with regard to the question of absolute privilege; and it seems to me that in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference. Mr. Rosario argued that only a qualified privilege existed in connection with the occasion of judicial proceedings and that the plea of privilege was only open to counsel, party, witness or prisoner subject to the obligation of proving that the imputation conveyed by the defamatory statement was made in good faith within the meaning of the 9th exception to section 499. If these were so, one would have expected to find amongst the exceptions and illustrations in section 499 some reference to a case of qualified privilege in connection with a statement made in the course of judicial proceedings. Not only do we find no reference to a case of absolute privilege as recognised by the law of England, but we find no reference to any case of qualified privilege in connection with judicial proceedings. The inference which I should draw from this would be that it was not

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the intention of the legislature to exclude the application of this doctrine of the English Common law from the law of defamation in India. The *exceptions* would seem to have been drafted with reference to the occasions of qualified privilege as recognised by the law of England omitting all reference to the question of privilege in connection with statements made in judicial proceedings or to the other classes of absolute privilege recognised by the law of England. There may be said to be five groups of exceptions to the section, all relating to occasions as to which qualified privilege is recognised. Exception I corresponds to the plea of justification. Exceptions II, III, V and VI correspond to the plea of fair comment. On a matter of public interests exceptions VII and VIII cover the cases of censure by a lawful authority passed in good faith. Exceptions IX and X cover the cases of imputation made in good faith by a person for the protection of his interests or for the public good, and the case of caution intended for the good of the person to whom it is conveyed or for the public good. Exception IV covers the plea of fair report of public proceeding.

I do not think that the canons of construction laid down by Lord Herschell in *Bank of England* v. *Vagliano Brothers*[1] are applicable here. His Lordship says on page 144, "I think the proper course is in the first instance to examine the language of the statute and to ask, what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view:" Now the English Bills of Exchange Act, which was the subject of Lord Herschell's observations, was a statute passed with the object of codifying the law as it then stood. The object of section 499 of the Code was to constitute defamation a criminal offence on lines which, generally speaking, follow the English Law of libel and slander. It was not intended to codify existing law but to create new law so far as this country was concerned.

This being so, in considering the intention of the legislature I think we are certainly warranted in taking into consideration what the law of England was at the time the Indian enactment was passed. If we are to seek for protection of witness and prisoners only within the four corners of section 499 of the Indian Penal Code or within the four corners of this enactment and the provisions of the Evidence Act, it seems to me that rather startling result would

1. (1891) A. C. 107 at p. 145.

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follow. In section 132 of the Evidence Act the legislature departed from the English law and enacted that a witness should not be excused from answering a relevant question on the ground that the answer would tend to criminate him, with the proviso that no such answer which a witness is compelled to give shall subject him, to any arrest or prosecution or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. As the section deals with criminating answers, the protection given by the proviso is limited to criminal proceedings. But if we are to look to the statute law of this country alone, the result would be that, unless a witness could prove good faith he would, if compelled to answer, be protected from a prosecution in respect of a defamatory statement, but he would not be protected against a suit for damages. Mr. Rosario contended that the words of the proviso were wide enough to include civil, as well as criminal, proceedings. But in my opinion, they are not. Again, if the privilege of a prisoner is to be ascertained by a reference, and only by reference, to the provisions of section 499 of the Penal Code, a prisoner who stated, in answer to a question put to him by the Court, that the witnesses for the prosecution had not spoken the truth, would, unless he could discharge the *onus* of showing that he made the statement in good faith, be liable to be prosecuted for the statement and would also be liable to suits for damages at the hands of all the witnesses to whom he had imputed the giving of false evidence. It might even be said, if the occasion is not absolutely privileged and the question of privilege is to be considered only with reference to the provisions of section 499, a prisoner who pleaded not guilty, unless he could show that this plea was made in good faith, would be subject to criminal or civil proceedings. I cannot bring myself to believe that the legislature in enacting section 499 intended to bring about such a result as this.

As regards the authorities in this country, conflicting views have been taken. Speaking generally, the trend of the decisions in the Madras and Bombay High Courts is that the occasion is absolutely privileged. The trend of the Allahabad and Calcutta decisions is the other way. We have, however, a decision of the Privy Council which is reported in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry,*[1] which clearly recognises the rule of the English Common law as applicable in this country. In that case their Lordships pointed out that the suit though called a suit for defamation, was in substance an action for malicious prosecution. The judgment runs :—" Their Lordships are of opinion with the

1. (1872) 11 B. L. R. 321.

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High Court, that if it had been, strictly speaking, such an action it could not have been maintained; for they agree with that court that witnesses cannot be sued in a Civil Court for damages, in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognized by the courts of this country to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty, which they should incur if they give evidence falsely should be indictment for perjury."

It is true that this opinion was expressed with reference to a civil action for damages and there is no reference to criminal proceedings. But as regards the question of principle this, as it seems to me, makes no difference. As to this, see the judgment of Sheppard, J, in *Manjaya* v. *Sesha Shetti.*[1] It is no doubt true that when the trial in which the question arose was held in 1866 the law of evidence had not been codified. But I do not think this has much bearing on the question that we have to decide, since section 499 of the Penal Code was in existence when this question arose for consideration before the Privy Council. Although their Lordships do not refer to the section, it of course, cannot be assumed that they did not consider its effect. The passage in the judgment above set out is, to my mind, a clear pronouncement to the effect that the English Common law doctrine applies in India. Their Lordships describe the doctrine as "recognized by all the courts of this country" and "one based upon principles of public policy." As regards Madras decisions, in a case reported in I Weir's Criminal Rulings, 612, a statement made by a prisoner that the complainant was kept by him as his concubine some years and was afterwards in the keeping of another person was held to be privileged. The ground of the decision however, was that the statement was true and fell within exception IX to section 499. In a case reported in I Weir's Criminal Rulings, 589, it was found that the defamatory statement made by the accused in answer to a question if he had anything to say was false and not made in good faith; Moore J was of opinion that the question of privilege must be decided with reference to the provisions of section 499. Subrahmania Ayar, J, was of opinion that the occasion was absolutely privileged. In *Manjaya* v. *Sesha Shetti*,[1] it washeld that the statement of a witness while under cross-examination before a Criminal Court was absolutely privileged. In the

1. (1886) I. L. R. 11 M. 477.

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case of *Hayes* v. *Christian*,[1] this Court held that where a person who was defended by counsel on a criminal charge interfered in the examination of a witness and made a defamatory statement with regard to his character, the occasion was not privileged. The Judges no doubt took the view that the question should be considered with reference to the provisions of Section 499. But they pointed out in connection with the English law that the words complained of could not be said to have been used *in the ordinary course* of a legal proceeding. In *In the matter of Alraja Naidu*,[2] the statement by a prisoner was considered to be absolutely privileged. The same view was taken in the case of *Pachai Perumal Chettiar* v. *Dasi Thangam*,[3] but there, there seems to have been a finding by the Judge who tried the case that the questions which constituted the defamation were put in good faith. In the case of *Pudmarazu Pantulu* v. *Venkatarmana Iyer*,[4] where the questions had been put in cross-examination by a vakil and the client who instructed the vakil was charged with defamation, the privilege was held to be absolute. In the case of *Adapala Adivaramma* v. *Rabala Ramachendra Reddy*,[5] where a suit for damages was brought in respect of a statement in an affidavit, the statement was held to be absolutely privileged. In the last reported Calcutta Case, *Golap Jan* v. *Bholanath Khettry*,[6] the learned Judges with reference to a complaint to a Magistrate, held that even if the complaint was defamatory, the complainant was entitled to protection from suit, and this protection was the absolute privilege accorded in the public interest to those who make statement to the courts in the course of, and in relation to judicial proceedings." The protection thus described is certainly not to be found within the four corners of Section 498 of the Penal Code. I do not think that this view can be reconciled with the view taken in some of the earlier Calcutta cases. See for instance the case of *Augada Ram Shaha* v. *Nemaichand Shaha*,[7] where it was held that a defamatory statement made in the pleadings in an action is not absolutely privileged, and the cases of *Queen* v. *Pursoram Doss* [8] and *Green* v. *Delany*.[9] As regards Bombay, it was held in *Nathji Muleshvar* v. *Lalbhai Ravidat*,[10] that no action for slander lies on any statement in the pleadings or during the conduct of suit against a party or witness. *Sargent*, C. J., held that the

1. (1892) I. L. R. 15 M. 414.
2. (1906) I. L. R. 30 M. 222.
3. (1908) I. L. R. 31 M. 400.
4. (1908) 19 M. L. J. 217.
5. (1910) M. W. N. 155.
6. (1911) I.L.R. 38 C. 880 at p. 888.
7. (1896) I. L. R. 23 C. 867.
8. (1867) 3 W. R. Cr. 45.
9. (1870) 14 W. R. Cr. 27.
10. (1889) I.L.R. 11 B. 97 at p. 100.

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rule of the English Common law was applicable and he observed "we doubt whether there is anything in the circumstances of this country which makes it less desirable from the point of view 'of public policy as concerning the public and administration of justice', as it is expressed by the Privy Council in the case above cited, that such statements, though false and malicious, should in no case be made the subject of the civil action quite independently of the question as to their being criminally punishable."

The same view was taken by the Bombay High Court where the witness was prosecuted for defamation in the case of *Queen Empress* v. *Babaji.*[1] In the case of *In re Nagarj Trikamji*,[2] the Court would seem to have been of opinion that the question of privilege must be decided with reference to the provisions of the Penal Code. As regards Allahabad, as I have said, the trend of authority is in the direction of holding that the occasion is not absolutely privileged. I may refer to the cases of *Abdul Hakim* v. *Tej Chander Mukarji*,[3] *Dawan Singh* v, *Mahip Singh*,[4] *Emperor* v. *Ganga Prasad*,[5] and *Isuri Prasad Singh* v. *Umrao Singh*.[6]

I agree with the conclusion arrived at by Mr. Justice Richards (now Richards, C. J.) who dissented from Knox, J., in the case of *Emperor* v. *Ganga Prasad.*[7] This judgment is in accordance with Madras authorities and seems to me to be based on sound principles. I would accordingly answer the question which has been referred to us in the affirmative.

Sankaran Nair, J.—I agree.

Ayling, J.—I also agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH)

Present:—Sir Charles Arnold White, KT., *Chief Justice,* Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Krishnamal ... ... *Petitioner** (*Complainant*).

v.

Krishnaiyangar and another. *Respondents* (*Accused*).

Penal Code SS. 499, 500—Defamation—Privilege—Statement before Registering Officer under the Registration Act, whether privileged?—Registrar not a judicial officer or a civil court.

1. (1893) I. L. R. 17 B. 127.
2. (1894) I. L. R. 19 B. 340.
3. (1881) I. L. R. 3 A. 815.
4. (1886) I. L. R. 10 A. 425.
5. (1881) I. L. R. 3 A. 685.
6. (1900) I. L. R. 22 A. 234.
7. (1907) I. L. R. 29 A. 685.

*Cr. R. C. 421 of 1911. 15th March 1912.

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v.
Krishna
Iyangar.

A defamatory statement made by a person opposing the registration of a will in his petition to the Registrar, objecting to the registration is not a privileged statement so as to except the party making it from liability to be punished for defamation, under S. 499, Penal Code.

A Registration Officer is not in the absence of express enactment to be deemed a judicial officer or a Civil Court.

Atchayya v. Gangayya[1] doubted and declared overruled by S. 195, Cl. 2, Civil Procedure Code.

Petition under Sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of the Sub-Divisional 1st Class Magistrate of Coimbatore in Calendar Case No. 23 of 1911.

The case coming on for hearing before (*Sundara Aiyar*, and *Spencer*, JJ.) the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.†

In this case the petitioner before this Court was the complainant in Calandar Case No. 23 of 1911 on the file of Sub-Divisional Magistrate of the Head-Quarter Division, Coimbatore. She charged the two accused with defamation by imputing to her sexual immorality in a statement made by accused before the District Registrar of Coimbatore in answer to a petition put in by her asking for the registration of a will. The Sub-Divisional Magistrate discharged the accused on the ground that their statement was absolutely privileged, and, that they were therefore not liable to be punished, under Section 500, Indian Penal Code. The question whether a statement by a defendant in a civil suit or by one who occupies a similar position is absolutely privileged or not is one on which the decisions of the Indian courts are not uniform. A Bench of this court has already made a reference to the Full Bench in Criminal Revision Case No. 216 of 1911 on the question whether statements made by an accused person in his defence are absolutely privileged or not. Having regard to the importance of the question and the fact that it is likely to arise for decision frequently, we consider it desirable that the question arising in this case for decision should also be referred to a Full Bench. We therefore refer the question whether a defamatory statement made by a person opposing the registration of a will in his petition to the Registrar objecting to the registration is absolutely privileged so as to exempt the party making it from liability to be punished for an offence, under Section 499, Indian Penal Code.

1. (1892) I. L. R. 15 M. 138.

† 16th October 1911.

Krishnamal v. Krishna Iyangar.

This case may be heard along with Criminal Revision Case No. 216 of 1911.

N. B.—The petition has not been heard on the merits.

V. Venkatachariar for *R. Sadagopachariar*, for petitioner.

B. Narasimha Rau for *S. Swaminadhan*, for respondents.

V. Venkatachari referred to several sections of the Registration Act to show that the Registrar was only an administrative officer and not a Court or Judge; he also referred to *Atchayya* v. *Gangayya*,[1] and to S. 195, Cr. P. C.

B. Narasimha Rau submitted that the Registrar was a quasi-judicial officer, like the returning officers in England to whose courts the privilege has been extended.

OPINION† :—

The Chief Justice:—The question referred to us is whether a defamatory statement made by a person opposing the registration of a will in his petition to the Registrar objecting to the registration is absolutely privileged so as to exempt the party making it from liability to be punished for an offence, under Section 499 Indian Penal Code.

In Criminal Revision Case No. 216 of 1911,[2] we expressed the opinion that a statement made by a prisoner in his defence was absolutely privileged and we based this opinion upon the ground that the English rule of common law, that anything said in the course of a judicial proceeding before a Court of competent jurisdiction by counsel, witness or party was absolutely privileged, applied in India. The question put to us is limited to a statement made by a person opposing the registration of a will. Our answer to this question must, in the first instance, depend on the view we take on the general question as to whether a registration officer is a Court so as to render proceedings before him absolutely privileged.

What we should look to, in considering this question, as it seems to me, is the general scheme and purpose of the Registration Act and not the special proceedings under particular sections.

The duties of the registration officers are, in the main, administrative, though, no doubt, for the purpose of discharging these administrative duties powers of a judicial character have been conferred upon them. The head of the establishment is an officer called the Inspector-General of Registration and he controls the department as an administrative officer.

1. (1892) I. L. R. 15 M. 138. † 15th March 1912.

2. (1912) 23 M. L. J. 59.

Krishnamal v. Krishna Iyangar.

Chief Justice.

There is no appeal from the decision of a Registration Officer to a Civil Court. If a party deems himself aggrieved by the refusal of the officer to register a document, he must institute a suit (Section 77). An order of a registration officer decides no question of right as between parties, beyond the question of the right of the party who presents the document to have the document registered. The powers conferred by Section 39 (compelling the attendance of witness), Section 63 (discretion to administer an oath), Section 75, (4) (compelling attendance of witnesses and making orders as to costs) are no doubt powers which are exercised by courts of justice; but the fact that a registration officer has these powers does not, in my opinion, make him a court of justice for the purposes of the question we have to consider what powers are necessary in order to enable him to discharge his administrative functions.

Section 87 protects a registration officer in the same way as Section 77 of the Penal Code protects a judge; but this does not, in my opinion, make him a judge. The inference which I should be disposed to draw from the provision in Section 84 (3) of the Registration Act, that in Section 228 of the Indian Penal Code the words "judicial proceeding" should include proceedings under the Registration Act, would be that, for other purposes, proceedings before a registration officer were not "judicial proceedings." Similarly, as it seems to me, the inference to be drawn from Section 484 of the Code of Criminal Procedure is that a registration office is not for ordinary purposes "a civil Court."

I do not think the definitions of "Court" in the Evidence Act and "Court of Justice" in the Penal Code afford us much assistance. These definitions were framed for the purposes of the Acts in which they are to be found.

In *Atchayya* v. *Gangayya*,[1] a Full Bench of this Court held that a Registrar acting under Sections 72—75 of the Registration Act was a Court for the purposes of Section 195 of the Criminal Procedure Code. A contrary view had been taken in *Queen-Empress* v. *Tulja and others*.[2] In *Queen-Empress* v. *Ram Lal*,[3] Knox J. declined to follow the Madras Full Bench Decision.

In *Marudayya Pillai* v. *Perumal Pillai*,[4] this Court held that a District Registrar exercising his ordinary functions of registering a document, the execution of which is not denied is not a Court within the meaning of Section 195 of the Criminal Procedure Code. In *Queen-Empress* v. *Ramaya Nadan*,[5] this Court held that a

1. (1892) I.L.R. 15 M. 138.
2. (1887) I.L.R. 12 B. 36.
3. (1893) I.L.R. 15 A. 141.
4. (1892) 2 M.L.J. 286.
5. (1893) 4 M. L. J. 189.

Krishnamal v. Krishna Iyangar.

Chief Justice.

Sub-Registrar acting under Sections 34 and 35 of the Indian Registration Act III of 1877 is not a Court within the meaning of Section 195 of the Criminal Procedure Code.

Since this case was argued before us Mr. *V. Venkatachariar* has called our attention to a case-*Manavala Goundan* v. *Kumarappa Reddi*,[1] where Subramania Aiyar, J. held that a District Registrar is not a Court within the meaning of Section 622 of the Code of Civil Procedure (1882) and that an order as to costs made by a District Registrar was not subject to revision.

So far as Section 195 of the Code of Criminal Procedure is concerned the matter has now been set at rest by the Legislature. See Section 195 (2).

It is not necessary to consider for what (if any) purpose, in the absence of express enactment, a registration officer is, or is to be deemed to be, a Court. The only question before us is, is he a Court for the purpose of rendering a statement made in an "objection petition" put in in the proceedings referred to in the order of reference, a statement made on a privileged occasion. For the reasons I have stated and for the reasons given by West, J. in dealing with the question of sanction for prosecution for perjury in *Queen-Empress* v. *Tulja*,[2] in my opinion, he is not.

I would answer the question which has been referred to us in the negative.

Sankaran Nair, J.:—I agree.

Ayling, J. :—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, KT., *Chief Justice* and Mr. Justice Sadasiva Aiyar.

Venkata Raghavalu Reddiar and another	*Appellants.*	*(Plaintiffs Nos. 1 and 2).*
Baggiammal and others ...	*Respondents.*	*(Defendants Nos. 1, 2 and 3 and 3rd plaintiff).*

Will.—Proof—Sound disposing mind.

If a testator has given instructions to another to make a will and that other prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator is that he should be able to think thus far "I gave X . . . , instructions to prepare a will making a certain dis-

1. (1907) 17 M. L. J. 313 2. (1887) I. L. R. 12 B. 36.

Appeal No. 59 of 1910. * 29th March 1912.

Venkata Raghavalu Reddiar v. Baggiammal.

Chief Justice.

position of my property. I have no doubt he has given effect to my intention and I accept the document put before me as carrying it out."

Parker v *Filgate*,[1] *Perera* v. *Perera*,[2] followed.

Appeal against the decree of the District Court of Chingleput in Testamentary Original Suit No. 23 of 1907.

The Court delivered the following

Judgment:—*The Chief Justice*:—This is an appeal from the decree of the District Judge of Chingleput refusing to grant probate of a will. The will is propounded by the three executors, two of whom are the brothers-in-law of the deceased, having married his two sisters. One of the brothers-in-law, Ramanjulu, joined with the other executors in applying for probate of the will in the Court below, but he has not appealed against the decree refusing probate. Probate is opposed by the widow of the deceased and by two illegitimate sons of the deceased. The deceased left him surviving his widow, the daughter of one Subba Naidu, a retired postmaster in Madras, a sister who married Ramanjulu, one of the executors who has a son, Appavu, and another sister who married another of the executors, Ramaswami Naidu, and he has no family. The will bears date June 17th, 1907, but the case for the plaintiffs is that it was not executed until June, the 18th. The deceased died on June, the 19th. He had been suffering from some urinary complaint for some years prior to his death and his last illness began about the 6th June 1907. The case for the plaintiffs who propounded the will is that he was of sound disposing mind on June the 18th, when the will is said to have been executed and that even in the view he was not of sound disposing mind on that date, he was capable of making a will on June the 14th, that he on that date gave instructions for the preparation of a will, and that the document which was put before him on June the 18th embodies those instructions and that the deceased understood this. It is the plaintiffs' case that the will was brought into existence as a result of a considerable amount of persuasion brought to bear upon the deceased by some of his friends at the instance of the deceased's father-in-law, Subba Naidu. The deceased had made a will, which had been registered in March 1905. By that will he devised lands in a certain village to his sister, the wife of Ramaswami Naidu, with reversion to Appavu, the son of his other sister. He left the rest of his property to Appavu Naidu subject to the payment of Rs. 40 a month to his widow. He cancelled certain debts owing to him including a debt due by a dancing girl. According to the plaintiffs' case Subba Naidu, the 1st defendant's

1. (1883) L. R. 8 P. D. 171.

2. (1901) A. C. 354.

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father, was dissatisfied with this will and in April 1907 asked some of the deceased's friends to try and persuade the deceased to make a fresh will more favourable to his widow. The deceased declined to do this. It is the plaintiffs' case that during the last illness of the deceased these efforts were renewed, and successfully. Under the will of which probate is now sought the widow gets a house in Tirumangalam and a village. The sister Ramaswami Naidu's wife, gets considerable landed property and Rs. 10,000 in cash with reversion to Appavu who is residuary devisee and legatee. The provision cancelling the debt due from the dancing girl is not reproduced.

Now, there can be no question that the will which has been propounded by the executors was the outcome of the suggestions made by certain of the witnesses called in support of the will at the instance of Subba Naidu and in the interest of the widow. The case for the defence is that the will was really brought into existence at the instance of Ramaswami Naidu and in the interest of himself and his wife, and this is the view which is taken by the District Judge. These being the circumstances in which the will is made, it is necessary to examine very carefully the evidence which has been adduced in support of the will, and unless we are satisfied that the will was, in fact, the will of the deceased, made by him as a free agent, notwithstanding that it was the outcome of suggestions made to him during his last illness by parties purporting to act in the interests of his widow, it cannot of course be admitted to probate. It is not suggested that the will was procured by undue influence, but it is clear that the will cannot be described as a spontaneous act of the deceased.

So far as the medical evidence goes the evidence if true is sufficient to establish that the deceased was of a sound disposing mind when he gave his instructions on the 14th of June and that he understood what he was doing when he accepted the document which purported to embody these instructions on the 18th of June. He was attended in his last illness by the Hospital Assistant and by Dr. Phillips an L. R. C. P. and L. R. C. S. of Edinburgh, who was summoned from Madras and who saw him on the 14th and on the 18th June. The Hospital Assistant speaking of the deceased's condition on the 18th stated that he was quite conscious and sensible when he signed the will and that he was then sitting in his chair, that he was able to give instruction to his clerk and was talking to his friends, that his condition was the same on the 14th, that his mind was clear and that he was able to

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speak to his friends and some business people between the 14th and 18th of June. Dr. Phillips deposed that he visited the deceased on the 14th of June and found him suffering from extravasation of urine, that he suggested an operation that the deceased had first consented but afterwards changed his mind that he then left after having been there about half an hour, that he saw him again in the early morning of June 18th and found him worse, that he had fever and his pulse was quicker and he was altogether in a worse condition than when he left him on the 14th, that he spoke to the deceased but he did not reply, that he thought the deceased was not pleased with his presence and that was why he did not speak because he spoke to the Hospital Assistant. In cross-examination he stated that on the 18th of June he thought the deceased made himself intelligible when he spoke to the Hospital Assistant, that he thought the deceased perfectly understood what the Hospital Assistant said, that he did not think the deceased was unconscious but that he was conscious, that if he had been treated by the witness he might have lived, that he was asked by the Hospital Assistant if it was safe to remove the patient to his village and that the witness told the Hospital Assistant that it was not safe to remove him at that stage. Curiously enough neither the Hospital Assistant who was called by the plaintiffs to support the will nor Dr. Phillips who was called for the defence was asked directly whether in his opinion the deceased was capable of making a will on June the 14th or on June the 18th. The District Judge came to the conclusion that the deceased was not of sound disposing mind " in spite of the evidence of Dr. Phillips and the Hospital Assistant." The Judge states that Dr. Phillips "did not give evidence in a straightforward manner and apparently came prepared to speak against the defence ;" and as regards the Hospital Assistant he observes that he was examined on commission and that the note of the District Munsiff who examined him shows that he displayed great bias on behalf of the plaintiffs and that his demeanour in the witness box was unsatisfactory. So far as the recorded evidence goes, there does not seem anything to warrant the criticism that Dr. Phillips did not give evidence in a straightforward manner. He answered the questions directly and it was not his fault that he was not asked, as he ought to have been asked, whether in his opinion the deceased was of sound disposing mind. The District Judge bases his opinion that the deceased was not of sound disposing mind on the 18th to some extent on the appearance of the so-called signatures which appear at the foot of each sheet of the will. There can be no question that although the signature on the first sheet possibly bears

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some remote resemblance to the signature of the deceased, the other signatures are rightly described by the District Judge as mere scribbles. The District Judge also finds that as regards some of the attesting witnesses they did not sign the alleged will on the 18th. From what I have said it is clear that this case is not free from difficulty. Although I am reluctant in a case of this sort to disturb the finding of a Judge who has had the advantage of seeing the witnesses and observing their demeanour, I have come to the conclusion that the evidence adduced in support of the Will is in the main true and that the deceased, even assuming that he was not capable of making a Will on June the 18th, was capable of understanding on that day that the document put before him embodied instructions previously given by him. As regards the law in this matter it was thus laid down by Sir James Hannen in *Parker* v. *Felgate*[1] "If a person has given instructions to a solicitor to make a Will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good Will, if executed by the testator, is that he should be able to think thus far, 'I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.'" The law as thus laid down by Sir James Hannen was cited with approval and acted on by the Privy Council in *Perera* v. *Perera*[2].

[His Lordship after discussing the evidence said:—"I have come to the conclusion that the evidence is sufficient to establish that instructions for the making of the Will were given by the deceased on the 14th when he was of sound disposing mind, that these instructions were embodied in the document which was put before him on the 18th and that on the 18th he was capable of understanding that that document embodied the directions which he had previously given."]

The appeal must be allowed and the will admitted to probate.

The plaintiffs may take their cost out of the estate. The defendants will pay their own costs here and in the Court below. [*Sadasiva Aiyar* J. agreed with his Lordship the Chief Justice in a separate judgment dealing with the evidence in the case. Ed.]

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1. 8 P. D. 171.

2. (1901) A. C. 354.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.*

Zamindar of Chittedu	*Appellant in all the Second Appeals.*	(*Plaintiff.*)
Pelleti Pedde Narayanappa Naidu and others	*Respondents in S. A. No. 1767 of 1908.*	(*Defendants and 3rd defendant legal representatives.*)

Landlord and tenant—Enhancement of rent—Absence of evidence to show payment of lower rate at any time.

Zamindar of Chittedu *v.* Narayanappa Naidu.

Where there is no evidence in the case to show that any lower rate than the one claimed was ever at any time paid, it is impossible to treat the rent demanded as a case of enhancement.

Second Appeals against the decree of the District Court of Nellore in Appeal Suits Nos. 12 to 17 of 1908 presented against the decision of the Court of the Deputy Collector of Gudur in Summary Suits Nos. 72, 77, 78, 80, 82 and 83 of 1907 respectively.

The Court delivered the following

Judgment:—The Deputy Collector finds that garden rates were paid by the ryots for nearly 40 years on these lands. The judge finds that the suit lands became garden lands only after the wells were sunk and that the wells were not dug more than 28 years ago. It is not clear from the appeal judgment whether the judge intended to find that the rents, which were admittedly paid by the tenants, were paid only after the wells were sunk, or whether he intended to set aside the finding of the Deputy Collector that these garden rates were paid for 40 years. We will therefore ask for findings on the following questions :—

(1) For what time were the ryots paying the garden rates ?

(2) When were the wells sunk ?

(3) Whether the ryots were paying garden rates before the wells were sunk ?

The findings should be submitted within six weeks from the date of this order and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge submitted the following finding, viz.,

* S. A. Nos. 1767 to 1772 of 1908. 12th March 1912.

Zamindar of Chittedu v. Narayanappa Naidu.

That the defendants have been paying garden rates on the suit lands since Fasli 1290 at least.

That the wells were sunk some time prior to Fasli 1290.

That he could come to no definite conclusion, though he considered it not unlikely that the "garden rates" and the "sinking of the wells" were contemporaneous.

These Second Appeals coming on for hearing again the Court delivered the following

Judgment:—We accept the findings of the District Judge on the first two points referred to him: that is, that both the sinking of the wells and the payment of the garden rates must be referred to some period prior to Fasli 1290, but how long before, it is impossible to say in either case.

The third point was 'whether the defendants were paying garden rates before the wells were sunk." On this the District Judge says there is practically no evidence and he can come to no definite conclusion, although he considers it "not unlikely that the garden rates and the sinking of the wells were contemporaneous." We cannot treat this very guarded surmise as a finding and can only take it that no finding is possible.

In these circumstances what conclusion should be arrived at? In our opinion the landlord's claim must be allowed.

The salient feature in this case which at once distinguishes it from the cases relied on by the respondents (*Fisher* v. *Kamakshi Pillai*,[1] *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa*,[2] and *Paramaswami* v. *Pusala Thevan*,[3] is that there is no evidence in this case to show that any lower rate than that now claimed was ever at any time paid. In other words it is impossible to treat this as a case of enhancement of rent. The rent now claimed has been, in fact, paid for at least 28 years before suit and there is no evidence of payment at any other rate. The landlord's claim must, therefore, be allowed. The decrees of the District Judge are set aside and those of the Deputy Collector restored with costs to the plaintiff throughout.

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1. (1897) I. L. R. 21 M. 136. 2. (1905) 28 M. 444.
3. (1909) 20 M. L. J. 142.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sadasiva Iyer.

Venugopal Naidu and others ... ... Defendants. (*Appellants.*)

v.

A. Ramanadhan Chetty and another ... Plaintiffs. (*Respondents.*)

Venugopal Naidu *v.* Ramanadhan Chetty.

Hindu Law—Joint family—Debts of father—Son's pious obligation—Words "Avyavaharika."

Sons of a Hindu father are under a pious obligation to discharge decree debts against the father personally, incurred in connection with litigation as a Devastanam Committee member.

Ghakowri Mahton v. *Ganga Pershad*, 32 B. 348 dissented from.

Dharbar Khachar v. *Khachar Harrur*, 15 C. L. J. 228 followed.

Ramayyengar v. *Secretary of State*, 20 M. L. J. 89 distinguished.

Per *Sadasiva Aiyar* J:—The term "Avyavaharika" 2 explained. "*Avyavaharika*" means a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a court of justice.

Second Appeal against the decree of the Subordinate Judge's Court of Madura (East) in Appeal Suit No. 528 of 1909, presented against the decree of the Court of the Additional District Munsiff of Madura in Original Suit No. 44 of 1908.

C. S. Venkatachariar for appellants.

K. Srinivasa Aiyar for respondents.

The Court delivered the following judgments:—

Sadasiva Aiyar, J.—The defendants 8 and 11 to 14 (5 of the legal representatives of the 3rd defendant who died pending the suit) are the appellants in the above second appeal. The suit was brought by plaintiff, one of the five members of a temple committee, for contribution from the other four committee members in respect of moneys which had been recovered from the plaintiff above in execution of the decree obtained by the trustee of the Madura Menakshi temple against the members of the committee (inclusive of plaintiff and 3rd defendant) for moneys which they had spent out of the temple funds in previous litigation carried on by them in the High Court, the High Court, having in that previous litigation directed that committee members should pay such costs out of their private funds and not out of the Devasthanam funds. (See the last sentence of the judgment in *Alagiri Swami Naicker* v. *Sundereswara Iyer.*[1])

*S. A. No. 1022 of 1910. 28th March 1912.

1. (1898) I. L. R. 21 M. 278 at p. 287.

Venugopal Naidu v. Ramanadhan Chetty.

Sadasiva Aiyar J.

The lower courts decided that the 3rd defendant's legal representatives (sons and grand sons) are liable to discharge 3rd defendant's debt to plaintiff, the debt being based on 3rd defendant's liability to contribute his quota of the amount paid by plaintiff alone to discharge the joint decree against plaintiff and his fellow committee members in the temple manager's suit. The only ground argued before us in this second appeal is the 4th ground in the special appeal memorandum. That ground is to the effect that 3rd defendant's sons and grandsons are not legally bound to discharge the debt incurred by 3rd defendant, to the Devestanam whose funds were spent without due authority by 3rd defendant and the other members of the committee, as 3rd defendant's descendants are not under a pious obligation to discharge such a debt.

Reliance is strongly placed by the learned vakil for the appellants in the case *Darbar Khachar* v. *Khachar Harrur*[1] where it was held that under the Hindu Law Texts, a son is not liable for his father's "*Avyavaharika*" debts, the term being interpreted by the learned judges who decided that case, as meaning "Unusual" or "not sanctioned by law or custom. The learned Judges ruled in effect that the son is not liable for debts which the father ought not, "as a decent and respectable man" to have incurred. That very learned judge, Mr. Justice Mookerjee of the Calcutta High Court has elaborately considered the whole question in a case *Ghakowri Mahton* v. *Ganga Pershad*[2] and I cannot usefully add anything to the observations found in the lucid judgment in that case. The learned Judge virtually dissents from the decision in *Darbar Khachar* v. *Khachar Harrur*[1] Learned Sanskrit scholars have differed from one another as to the meaning of the expression "*Avyavaharika*" debt (see the first paragraph in page 231 of the judgment in 15 Calcutta Law Journal case.) I am inclined to accept Colebrooke's paraphrase namely "debt incurred for a cause repugnant to good morals" as more nearly approaching the true import of the expression than any of the meanings given by the other authorities. If I might venture upon giving my own translation of the expression "Avyavaharika" I would paraphrase an Avyavaharika debt as a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a court of justice (compare the use of the word "Vyavahara" in such expressions as Vyavahara Mayukha, Vyavahara Darpana, etc.)

1. (1908) I. L. R. 32 B. 348.

2. (1912) 15 C. L. J. 228

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Sadasiva Aiyar J.

The 3rd defendant clearly owed a legally valid debt to the Devasthanam even if he had really misappropriated the moneys which he had taken from the Devastanam fund (instead of having merely sanctioned their expenditure *bona fide* on inappropriate objects) and his descendants are bound to repay that debt according to the decision in *Natesayyan* v. *Ponnusawmi*[1] where it is observed "upon any intelligible principle of morality, a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which, punishment in a future state might be expected to be inflicted, if in any.

As regards the case in *Ramayyengar* v. *Secretary of State*[2] (also relied on strongly by the appellant's learned Vakil) that decision rested "on its own special circumstances," for, the learned Judges found in that case that the father knowingly brought a false case as a pauper. When he lost the suit and was made liable for the Government cost, it was held that his sons were not liable to Government for such costs so incurred. Without saying that I agree with the reasons given in the said decision, that decision is easily distinguishable from the present case. The judgment in *Alagiriswami Naicker* v. *Sundaramier*[3] does not establish that the committee members (three of whom joined in the appeal to the High Court with the concurrence of the remaining two) *dishonestly* preferred the appeal to the High Court which appeal costs they were directed to bear out of their private funds. Imprudent and even "unconscientiously" imprudent debts of the father are not in my opinion, immoral, illegal or "Avyavaharika" debts (see *Khalibal Rahman* v. *Gobind Pershad*[4]) and the sons cannot, in Hindu Law escape liability for such debts of their father.

This Second Appeal consequently fails and is dismissed with the costs of first respondent (plaintiff).

Benson J:—I agree that the sons are liable and that the second appeal should be dismissed with costs.

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1. (1892) I. L. R. 16 M. 99.
2. (1909) 20 M. L. J. 89.
3. (1898) I. L. R. 21 M. 278.
4. (1892) I. L. R. 20 C. 328.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Justice Benson and Mr. Justice Sundara Aiyar.

V. Subba Row ... ... *Appellant.* (*1st Defendant.*)

v.

Annathanarayana Aiyar and others } *Respondents.* (*Plaintiff and Defendants Nos. 2 to 9*).

Hindu Law—Joint family—Partition—Partial Partition by alienee from co-sharer.

Subba Row *v.* Annatha-narayana Aiyar.

In a suit for partial partition *i.e.*, for partition of an item of property by the transferee from a co-parcener of a joint Hindu family, the defendants are not entitled to ask that the suit should be dismissed on the mere ground that the suit does not comprise all the family properties and they can only claim either that there should be general partition among all the members of the family or that before the plaintiff is allowed the share in specific property purchased by him the equities as between the co-parceners should be taken into account and adjusted ; but where on the pleadings or the facts found there are no equities which the other members have against the purchaser of the right of one of the members which can only be worked out in a general suit for partition, the suit for partial partition will lie *Harikrishna Chowdhury* v. *Lakshimi Narayan Puntulu*[1] referred to.

On an alienation of the share of a co-parcener in one out of several items of properties, the joint tenancy of all the members, including the one whose right in the particular property is transferred to a third person, with respect to the other properties in the family is not affected by the alienation. The members of the family preserve their undivided status and they also continue to remain joint tenants with respect to all properties except that with respect to which the right of one of them passed to a stranger ; with regard to the property affected by the transfer the alienee is a tenant in common with the members of the family other than the alienee, these other members being still joint tenants amongst themselves with respect to their own shares.

The transferee acquires the share of the transferor at the time of the transfer, but subject to the important qualification that the right obtained is subject to all the equities available to the other members of the family against the transfer. The different view entertained in the earlier decisions explained and declared no longer law.

The rule against partial partition is not a rule of Hindu law but owes its existence to judiciary law ; elsewhere in India co-tenancy and joint tenancy are the result of contract and the rule against partial partition will hold good there. But in the case of a joint Hindu family the tenure is not the result of any agreement ; and the right to insist on a partition does not stand on the same footing as it might in cases of co-tenancy arising from contracts.

Second Appeal from the decree of the District Court of Salem in Appeal Suit No. 202 of 1908, presented against the decree of the Court of the District Munsif of Namakal in Original Suit No. 1197 of 1904.

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* S. A. No. 732 of 1910. 21st March 1912.

1. (1910) 20 M. L. J. 323.

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K. Ramachandra Aiyar and *T. M. Krishnasawmy Aiyar* :— The rule that property outside the jurisdiction need not be sought to be divided applies only when a claim cannot be made in respect of such property also without leave of the court. *Kadir Bhi* v. *Rahiman Bhi*,[1] *Balarau* v. *Ramachandra*,[2] otherwise the law is presemptory. *Ibrramsa Rowthan* v. *Thirumalai Muthuvira Thiruvenkatasami*,[3] *Venkatarama* v. *Mera Labai*,[4] *Palani Konan* v. *Masa Konan*[5] *Syed Habibwi Rasel Abdul San* v. *Ashita Mohan Ghosh*[6], *Subramaniyam Chettiar* v. *Padmanabha Chettiar*[7], *Shiva Murteppa* v. *Verappa*.[8]

The basis of the rule no doubt is the existence of equities but the absence of equities to adjust is no reason to relax the rule in any particular case. From the theory of Mitakshara Law, it follows that no member can predicate that he has right to any particular portion of the family property. There is nothing in *Ramachandram Pillai* v. *Kalimuthu chetty*,[9] against this *Harikrishna Chowdry* v. *Venkatalakshimi Narayana*.[10].

C. V. Ananthakrishna Aiyar for respondents.

The Court delivered the following

Judgment :—The plaintiff in the suit, out of which this Second Appeal arose, purchased the right of the 3rd defendant, a member of an undivided family consisting of defendants Nos. 1 to 8, in certain lands in court-auction in execution of a decree obtained by him against the 3rd defendent. This suit was instituted in the District Munsif's Court of Namakal, Salem District, and was to recover the 3rd defendant's one-fourth share in those lands. The contesting defendants pleaded that there were other properties belonging to the family in the District of Coimbatore and in the Native State of Cochin and that the suit for the division of part only of the properties belonging to the family was not maintainable. They pleaded also that there were debts belonging to the family and that no partition could be allowed without making provision for the discharge of those debts. There were also other pleas, *viz*, that the plaintiff's claim was barred by the rule of *res judicata* and that the 3rd defendant had relinquished his right in the family property before the plaintiff's purchase. We disallowed these pleas at the hearing and we do not consider it necessary to deal with them further.

After the issues in suit had been framed, the 1st defendant asked that certain further issues should be raised, *viz*., (1) whether this suit is beyond the jurisdiction of this court ? (2) whether there

1. (1866) 3 M. H. C. 167
2. (1898) I. L. R. 22 B. 922.
3. (1910) I. L. R. 34 M. 269.
4. (1889) I. L. R. 13 M. 275.
5. (1896) I. L. R. 20 M. 243.
6. (1908) 12 C. W. N. 640
7. (1896) I. L. R. 19 M. 267.
8. (1899) I. L. R. 24 B. 128.
9. (1911) 21 M. L. J. 246.
10. (1910) I. L. R. 34 M. 402

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are other properties, debts and incomes connected with the family as alleged by the 1st defendant ?, and (3) whether all those should be included in this suit and whether they should be got by all ? The District Munsif disallowed this application on the ground that they did not arise out of anything contained in the original written statement. Complaint was made in the grounds of the appeal preferred by the defendants in the District Court against the Munsif's judgment that the Munsif "ought not to have disallowed the application for further issues necessary for the proper determination of all the contentions of the parties in the case." But the vakils who appeared for the appellants intimated at the hearing "that they did not press the grounds of appeal regarding the adequacy of issues or of the necessity for framing additional issues." The defendants insisted both in the Munsif's Court and in appeal that the suit should be dismissed on the ground that it did not ask for a partition of all the properties belonging to the family, for awarding to the plaintiff the 3rd defendant's share in the lands purchased by the plaintiff. Both the lower courts disallowed this application on the ground that the rule that a suit for partial partition will not lie, does not apply where the properties not included do not lie within the jurisdiction of the court in which the suit is instituted and that such was the fact in this case as the other properties were within the jurisdiction of the courts in Coimbatore and Native Cochin. The learned District Judge relied in support of his view chiefly on *Subba Row* v. *Rama Row*.[1] It is argued that that ruling is not applicable to suits instituted after the Civil Procedure Code, Act VIII of 1859, was repealed, according to which, a suit for recovery or partition of immoveable properties situated within the jurisdiction of more courts than one could be instituted in any one of the courts within whose jurisdiction part of the property was situate only with the permission of the court, while under the Procedure Code of 1877 (Act No. X of 1877) and the subsequent Codes such a suit could be instituted without any permission of court in any court within the local limits of whose jurisdiction any portion of the property is situate. The argument is that it was because the plaintiff could not be bound to ask for permission to include in his suit properties, situated within the jurisdiction of another court, that it was held that he was not bound to include in a suit for partition properties which were not within the jurisdiction of the court in which the suit was instituted. We are of opinion that there is force in this contention and we would be inclined to consider this question further if we did not come to the conclusion

1. (1867) 3 M. H. C. R. 376.

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that we were not bound in this case for other reasons to give effect to the contention that the suit must fail on the ground that it was one for partial partition.

The suit in this case is not by a member of an undivided family but by a purchaser of a portion of the rights of one of the members of such a family. It has been fully established in this Court that such a purchaser acquires the share of the member whose right he has purchased as it stood at the time of his purchase. See the decision of the Full Bench in *Iburamsa Rowthan* v. *Venkatasami Naick.*[1] As pointed out by Krishnasami Aiyar, J. in that case, the joint family ownership of the members of the family in the property alienated by one of them becomes severed to the extent of the share of the member whose right has passed to a stranger. It does not affect the joint tenancy (to use a convenient, though, somewhat inaccurate expression) with respect to it, so far as the other members of the family are concerned. It is hardly necessary to say that the joint tenancy of all the members, including the one whose right in the particular property is transferred to a third person, with respect to the other properties in the family, is not affected by the alienation. The position briefly is this. The members of the family preserve their undivided status and they also continue to be all of them joint tenants with respect to all properties except that with respect to which the right of one of them has passed to a stranger. With regard to the property affected by the transfer the alienee is a tenant in common with the members of the family other than the alienor, those other members being still joint tenants amongst themselves with respect to their own shares. In earlier decisions of this Court a different position had been taken up. It was held that the transfer of the right of an undivided member, in the whole or part of the family property, gave the transferee only an equity and not what strictly could be termed a right in property, the equity being right to enforce partition and to ask the court, out of what may be given on division to the member whose right has been transferred, some property that would be sufficient to give effect to what the transferree purported to acquire under the transfer. This equity, it was held was liable to fluctuation so as to diminish but not to increase and so as also not to be destroyed though liable to diminution. See the judgment of the learned Chief Justice in the case above referred to. This position must be taken to have been now definitely abandoned after an examination of the decisions of the Privy Council and of the various High Courts bearing on the point, and we must now

1. (1910) I. L. R. 34 M. 269.

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proceed on the footing that the transferree acquires the share of the transferrer at the time of the transfer, but subject to this important qualification that the right obtained on transfer is subject to all the equities available to the other members of the family against the transferrer. Thus they might shew that the transferrer was under obligations to the family which he would be bound to satisfy before getting any share in the property transferred, and, if these obligations would completely destroy his right in that property and disentitle him to get any share thereof, the transferree would also be subject to the same equity. But barring the liability to have such equities set up against a transfer, the transferree is entitled to the transferrer's share as it stood at the time of the tranfer. See the judgment of Sir V. Bhashyam Ayyangar, J. in *Ayyagari Venkatramayya* v. *Ayyagari Ramayya.*[1]

The question therefore for decision is whether a transferree who is a tenant in common with reference only to a portion of the family property with the members of the family other than the member whose right he has purchased is absolutely disentitled to claim a partition of the property in which alone he is interested or is entitled to claim such partition subject to any equities that may be set up by them against his privy in interest. If the latter position be the correct one, then the decree of the lower courts in the plaintiff's favour must be upheld, for we are of opinion, on the facts found, that no equities have been proved which would disentitle the plaintiff to a decree for partition of the property in question. It was no doubt contended by the defendants that there were debts binding on the family which should be provided for and they press for an issue on that question. But in the lower appellate court they abandoned their demand for such an issue. It was not alleged that the exclusion of the properties in Coimbatore and Cochin from this suit would subject the defendants to any disadvantage in the matter of dividing them subsequently. If then they are not likely to suffer any injury by the partition being allowed, are we bound to dismiss the suit in Second Appeal on the ground of any rigorous rule of law that partial partition cannot be allowed? *Ram Mohan Lal* v. *Mulchand*,[2] is a distinct authority against the defendant's contention. The facts there were very similar to those in this case except that the alienation by a co-parcener in part of the family property was made with the consent of the other members of the family. But this fact has really no bearing on the question for considerations Banerjee and Richards, JJ. in decreeing the purchaser's claim observe.—" The plaintiff is admittedly not a member of a joint

1. (1902) I. L. R. 25 M. 690. 2. (1905) I. L. R. 28 A. 39.

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family. Therefore the property sought to be partitioned is property held by certain persons who can only be deemed to be joint owners of it. There is nothing to preclude one of the joint owners of several items of property from seeking a partition of one of such items of property." The learned judges followed the decision in *Srimati Padmamani Dasi* v. *Srimati Jagadamba Dasi.*[1] It is contended that this view is contrary to the decisions of this Court in *Venkatarama* v. *Meera Labai*,[2] and *Venkkyya* v. *Lakshmayya*,[3] and other cases, and that it is a well-established rule that a suit for partial partition must be dismissed whether the plaintiff be a member of the family or a transferree of his rights in the whole or a part of his property. We are of opinion that no such hard and fast rule is laid down in the decisions of the High Courts. Where the plaintiff is a member of an undivided family the decision of the question would probably not stand on the same footing as when he is only a transferree. In the former case, one of the objects of the suit is the dissolution of the status of undivided members and it may well be argued that the court will not help a plaintiff who wants a division only of some of the properties. Such a division, it may be urged, may raise the question whether the court decree would altogether effect a severence of the status of the members and make them tenants in common with respect to the properties left undivided or whether the status of the parties would remain that of undivided co-parceners with respect to such properties. Some cases at least seem to have recognised that the status of the members may be different with respect to the properties actually divided and those that are not divided (see Mayne's Hindu Law, 7th Edition, Section 493). But though the parties may perhaps effect such partial severence in status, the court may well refuse to pass a judgment which would give rise to a difficulty of this kind. It may no doubt well be held that even where a decree of court does not direct a division of all the members, a partition decree would always have the effect of dissolving the undivided character of the family. This would solve the difficulty mentioned above. It cannot be denied that the courts have always recognized the right to a decree for partial division where some of the properties are beyond the jurisdiction of a court or where the property is in the possession of a mortgagee or other third party entitled to hold it and so not available for actual division at the time (see the judgment of Ranade J. in *Shivmurteppa* v. *Virappa*,[4] a second suit will also lie for enforcing the division of the properties omitted in the former suit by over-

1. (1871) 6 B. L. R. 184.
2. (1889) I. L. R. 13 M. 275.
3. (1892) I. L. R. 16 M. 98
4. (1899) I.L.R. 24 B. 128 at p. 135.

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sight (see *Gorachand Haldar* v. *Basanta Kumar Haldar*[1]). Clearly therefore there is no invariable rule that the court will not decree partial partition. After all, the principle underlying the rule is only one of equity and convenience. It would ordinarily be unfair where the co-owners are in possession of different portions of their common property to allow one of them to claim a partition of property in the possession of the others and to allow him to refuse to bring into hotchpot properties in his own possession. It would also be unfair to allow partition of some only of the common properties where the co-owners (defendants) would be prejudicially affected by a partial division, by provision not being made for the discharge of debts or for the rendering obligations due by the plaintiff to his co-sharers in connection with the common holding. But if there is no question of any equities or of any inconvenience, as in a case where several distinct estates are owned by the co-sharers, there seems to be no principle which requires that the court should necessarily refuse to decree a partition of one of them. The rule against partial partition is not confined to property held by the members of an undivided family or by joint tenant in England but applies equally to tenants in common. See *Parbati Churn Deb.* v. *Ainuddeen*,[2] *Ramasami Chetti* v. *Alagirisami Chetti*,[3] and *Hari Kistna Chowdary* v. *Lakshminarayana Pantulu*,[4]. The right of the defendant in such a case is not to have the suit dismissed *in toto* but to insist on the plaintiff including all the properties in the suit and amending his plaint for the purpose. If he refuses to do so he would no doubt run the risk of having his suit dismissed. Mr. Freeman in his article on partition in the Cyclopædia of American Law and Procedure, Volume 30, says (see page 176) "every suit in partition should bring before the court all persons having any right or equity in the property. Therefore such suit should include all the lands of the original co-tenancy, and if it does not do so, any party, whether his interest extends throughout all such lands, or is restricted to some specific part thereof, may insist that the omitted land or lands be included in the suit, and that all persons be made parties thereto whose presence is necessary to a partition with such lands included." The question is really one relating to processual law and must be decided not according to any rule of Hindu Law, but according to the principles of Civil Procedure recognised and enforced by the court; the rule against partial partition owes its existence to judiciary law as pointed out in *Ibrahimsa Rowthan* v. *Theru Venkatasami Naick*[5]. Elsewhere than in India co-tenancy whether as

1. (1912) 15 C. L. J. 258.
2. (1881) I. L. R. 7 C. 577.
3. (1903) I. L. R. 27 M. 361.
4. (1910) 20 M. L. J. 323.
5. (1910) I. L. R. 34 M. 269 at p. 270.

joint tenants or tenants in common is generally the result of a contract. And it may be held that where certain persons agree to hold certain property in common one of the parties to such an agreement cannot claim to put an end to the agreement in part by claiming division of a portion only of the property and that if he wishes to dissolve the agreement the other parties should have a right to put an end to it *in toto*. But the tenure of the members of a joint Hindu family is not the result of any agreement. It may no doubt be generally proper to concede the demand of the defendants in a suit for partition by an undivided member that all the properties should be divided, and it may be that a subsequent suit for partition of other properties by the same plaintiff may be barred by Rule 2, Order II of the Code of Civil Procedure. But the right to insist on such division does not stand on the same footing as it might in cases of co-tenancy arising from contracts.

Proceeding now to deal with the decisions, in *Srimati Padmamani Dasi* v. *Srimati Jagadamba Dasi,*[1] Phear, J., dealing with the claim made by one of two Hindu daughters holding as co-parceners for a partition of part only of the joint property of both, observes, at pages 140 and 141, "I must add that I find nothing to make me think that the plaintiff must necessarily bring a suit, if he brings a suit at all, for partition of the whole of the joint property. Clearly, if the parties themselves have already effected a partition, it could not be in the power of the plaintiff to ask that that partition should be undone, simply in order that the whole estate might be divided *de novo*. I think that the plaintiff may confine his application to the court to that particular part of the property which he is desirous of having divided; but then it follows, from the view which I have already endeavoured to express, that, in a suit so brought, it will always be open to the other parties to show that that part of the property ought not to be divided, or could not fairly be divided, without taking into consideration the rest of the property, and dividing it also.........I think that the Advocate-General has shown no reason going to the root of the suit, why it should not be heard, and a decree passed in it. If, however, on the part of his client, he can go further than he has done, and would give me ground for thinking that a fair and equitable division of the joint property of these two ladies could not be come to without bringing in the moffussil property, and making that the subject of division together with the Calcutta property, I think I may possibly consider it right to stay the proceedings in this suit upon his undertaking to file a plaint within a reasonable

1. (1871) 6 B. L. R. 134.

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time, embracing the whole of the property, and of course to ask for the necessary leave for that purpose." The observations show the real character of the defendant's rights when a claim for partial partition is made by a co-parcener. In *Ship Suhaye Singh* v. *Nursingh Lall*,[1] Couch, C. J. refused to give any opinion upon the question whether a suit for partition of part of the property of a joint Hindu family can in any case be allowed. The learned Judge observes that he did not intend to decide any such question in *Nanabhai Vallabdhas* v. *Nathabhai Haribhai*,[2] which was relied on by the defendant, and he adds that the latter case was decided upon grounds peculiar to itself. In *Radha Churn Dass* v. *Kripa Sindhu Dass*,[3] Garth, C. J. and Princep, J. observe, at page 476. "It seems very doubtful whether by the Hindu Law any partial partition of the family property can take place except by arrangement." But the learned judges based their opinion (page 477) on the ground that "in order to effect a just partition, it is necessary of course to ascertain the share to which each and every member of the family is entitled." And they went on to say "We have not been able to find any case in the books, in which either a suit has been brought for a partial partition, or a partial partition has been adversely decreed." The attention of the learned Judges does not seem to have been drawn to the judgment of Phear, J. in *Srimati Padmamani Dasi* v. *Srimati Jagadamba Dasi*.[4] In *Haridas Sanyal* v. *Pran Nath Sanyal*,[5] the refusal of partial partition, was based purely on the defendants' plea that such a decree would be unjust to the defendants in that case. In *Jogendra Nath Mukurji* v. *Jugo Bundhu Mukerji*,[6] the plantiff did not include in his plaint certain property which he claimed as his self-acquisition. It was found to be part of the joint family property. The court of first instance as well as the court of appeal dismissed the suit. In Second Appeal, Petharam, C. J. while confirming the the decision of the lower courts observed at page 123. "Another question that arises is, whether a suit of this kind must be dismissed because it apears that the plaintiff has sought to partition only a portion of the joint property. It is a point upon which I should have thought there was room for doubt, but looking at the authorities, I find that the authorities are in favour of such a suit being absolutely dismissed because it cannot be brought in that form, and therefore it seems to me we are bound to follow those authorities and to dismiss this appeal." We are unable to agree that there really was a course of

1. (1874) 22 W. R. C. R. 354.
2. (1870) 7 Bom. H. C. R. A. C. J. 46.
3. (1879) I. L. R. 5 C. 474.
4. (1871) 6 B. L. R. 134.
5. (1886) I. L. R 12 C 566.
6. (1886) I. L. R. 14 C. 122.

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decisions which constrained the learned Chief Justice to dismiss the suit. In *Chunder Nath Nundi* v. *Hur Narain Deb*,[1] a claim for partial partition was allowed. The parties were tenants in common and not members of an undivided family. But as already pointed out this difference is not essential. Tottenham, J. observed "The court might hesitate to allow him a decree for the severance of a portion only of his share, or of his proportionate shares of particular plots; but if he claims to have his whole share divided, as Mr. Bell states that he does, and disclaims any share in lands not included in this suit, I see no reason why he should not obtain what he claims." See also *Wamnaji* v. *Atmaram*[2], Printed Judgments of the Bombay High Court for 1883, Page 337, where the same view was adopted in similar circumstances in the case of members of an undivided family. In *Parbati Churn Deb* v. *Ainuddeen*,[3] where also the co-tenants were not members of an undivided family, partial partition was refused. The claim related to a very small portion only of the common holding. The reason for the refusal was the inconvenience to which the defendant whould be put. *Garth*, C. J. observed, at page 581, "The defendants are entitled, by right of their patni, to an undivided four annas share in a large estate of 100 drones; and if the plaintiff was entitled to compel a partition as against the defendants of an area of two drones only, the defendants might, in respect of the same estate, be subjected to forty or fifty claims for partition at the suit of forty or fifty different persons, each of whom is in the plaintiff's position, and might be put to great expense in consequence of his estate being divided into forty or fifty separate areas." In *Syed Habibur Rasul Abul Faiz* v. *Ashita Mohan Ghosh*,[4] on the other hand, a claim for partial partition was allowed at the instance of one of the co-owners. It is pointed out that *Parbati Churn Deb* v. *Ainuddeen*,[5] proceeded merely on the ground of inconvenience in the particular case. *Ram Mohan Lal* v. *Mull Chand*,[6] and *Radha Kanta Shaha* v. *Bipro Das Roy*,[7] were followed. In the latter of these cases, the same view was taken of *Parbati Churn Deb* v. *Ainuddeen*,[5] and partial partition was allowed. See also *Hemadri Nath Khan* v. *Ramani Kanta Roy*[8] and *Barahi Debi* v. *Deb Kamini Debi*,[9] in which Petheram, C. J. took part and in which the correctness of *Parbati Churn Deb* v. *Ainuddeen*,[5] was questioned. In the Bombay High Court, Couch C. J. was supposed to have laid down in *Nanabhai Vallabdhas* v. *Nathabhai Haribai*,[10] that a member

1. (1881) I. L. R. 7. C. 153.
2. (1883) P. J. Bom 1883. p. 337.
3. (1881) I. L. R. 7 C. 577
4. (1909) 12 C. W. N. 640.
5. (1881) I. L. R, 7 C. 577
6. (1905) I. L. R. 23 A. 39.
7. (1904) 1 C. L. J. 40.
8. (1897) I. L. R. 24 C. 575.
9. (1892) I. L. R. 20 C. 682.
10. (1870) 7 Bom H. C. R. A. C. J. 46.

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of an undivided family cannot claim a partition of portion only of the family property. But that learned Judge observed in *Ship Suhaye Singh* v. *Nur Singh Lall*,[1] as already pointed out, that he intended to lay down no such general rule and that his decision proceeded on the facts of the particular case. This is clear from his judgment (7 Bom H. C. R. A. C. J., 45) in which he observes, at page 49, "Under the circumstances, it is incumbent upon him (the plaintiff) to shew that all the other lands except the parcel sued for have been divided, or to shew the reason why they have not been divided. It seems that the plaintiff sues for a share of the lands in which there is no dispute, and leaves the defendants to claim their share in a fresh suit. This cannot be allowed. The plaintiff has not clearly shown that he relinquishes his claim to all other land; and not having done so, and being in possession himself of other undivided property, he cannot, contrary to the agreement which contemplates a single partition, sue for a parcel without including the whole claim." In *Udaram Sitaram* v. *Ranu Panduji and Venku Panduji*[2] the plaintiff was the purchaser in court-auction of the share of one of the members of a family in a portion of the family property. The question in the case was whether a Hindu co-parcener's right in the family estate could be validly attached by a creditor. Westropp, C. J. made certain observations regarding the nature of the rights of purchasers from a member of an undivided family. He observed, at page 82, "When share in the undivided ancestral estate of a Hindu family is mortgaged or sold, either by the parcener himself, or by way of execution, the mortgagee or purchaser takes such share subject to such *prior* charges or incumbrances as may affect the family estate, or as may affect that particular share. If the mortgage or sale be of a special portion only of the family property, it may not always be possible, consistently with prior existing rights, for the court making the partition, to give possession of that portion to the mortgagee or purchaser. But generally it would be possible to do so, either wholly or partially, and, therefore, if without doing injustice either to prior incumbrances or co-parceners, such possession can, on partition, be given, it would be the duty of the court making the partition, to endeavour to give effect to the mortgage or sale, and so to marshal the family property amongst the co-parceners as to allot that portion of the family estate, or so much thereof as may be just, to the mortgagee or purchaser." The learned Judge went on to say "The proper mode of attaching a parcener's share in the family property under an ordinary money decree would seem to be that the attachment should go against the

1. (1874) 22 W. R. C. R. 352. 2. (1875) 11 Bom. H. C. R. 76.

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share, right, title and interest of the judgment-debtor in such parts of the family property (naming and describing them) as the judgment-creditor can specify, and against his share, right, title, and interest in all other parts of the family property. It would be unreasonable to expect the judgment-creditor to be able to specify in detail the family property, but he should do so to the extent which his information would permit." There is nothing in these observations to show that the purchaser of an undivided member's share in particular property cannot, under any circumstances, be allowed a decree for that member's share in the properties transferred to him. The learned Judge merely points out how the question would have to be regarded if the purchaser claimed the whole of certain specific property, under an alienation of the right of one of the members in the family property, and what equitable pleas would be open to the other members in such a case. In *Shivmurteppa* v. *Virappa*[1] the question was fully discussed by Parsons and Ranade, J J. The plaintiff, the purchaser of the rights of one co-parcener in a warehouse, claimed to recover the member's share in it by partition. The claim was allowed by the lower courts. Parsons, J. observed at page 130 "It appears to us that that might be a correct mode of disposing of a case where no one of the co-parceners except the purchaser wished a partition, but that the principle cannot be applied where a general partition is desired and asked for." This is clear authority for the position that the other co-parceners cannot ask for the dismissal of a suit on the ground that it is one for partial partition but can only claim that there should be a complete division amongst all the members. The learned Judge (Parsons, J.) refers to *Gadadhar* v. *Balvant*,[2] where a purchaser was allowed the rights of the co-parcener in a particular item without a general partition being decreed amongst all the members. He observes that this principle will not apply where the members of the family themselves desire a general partition because "it is the right of every defendant in a partition suit to ask to have his own share divided off and given to him, and the fact that the partition suit has been brought by a purchaser cannot alter or annul that right." Ranade J. observed, at page 135, that, as the plaint had been amended so as to include all the properties alleged to be jointly owned by the two brothers, the lower courts were wrong in refusing to decree a general partition. The defendants' contention as pointed out by the learned Judge was that the share of his brother in the particular warehouse in dispute could not be determined without considering all the equities arising between the claims of the appellant and his brother. In the result

1. (1899) I. L. R. 24 B. 128. 2. (1889) P. J. (1888) Bombay H. C. p. 250.

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the suit was remanded for retrial. It cannot be held that there is anything in Ranade, J.'s judgment to show that in his view the defendant could always claim to have a suit by a purchaser for partition of the property in which he is interested dismissed, and the observation of the learned Judge regarding the general rule against partial partition must be understood with reference to the facts of of the case.

With regard to this Court, in *Venkataram* v. *Meera Labai,*[1] *Venkayya* v. *Lakshmayya,*[2] *Palani Konan* v. *Masakonan,*[3] suits by a purchaser for partition of property in which alone, he was interested were no doubt dismissed. The reason for disallowing partial partition against the will of the other members without suing for a general partition of the entire family property is thus expressed in the opinion of the Full Bench in *Iburamsa Rowthan* v. *Theru Venkatasami Naick.*[4]—" There may be equities which those other members have against the vendor of the plaintiff which can only be worked out in a general suit for partition and in working out those equities the plaintiff's vendor and hence the plaintiff may be assigned a different item from the items he purported to buy or even a smaller share than those items represented." The case itself was one in which the purchaser from one of the members of his share of the property already alienated by other members to strangers sued the alienees of those others for the share of his vendor in the family property and it was held that such a suit would lie. In the order of reference to the Full Bench it is pointed out (see page 270) that there is nothing in the Hindu Law preventing a suit for partial partition and that the rule in question " is more a creature of judiciary law than of the Hindu lawgivers." The observations we have cited from the opinion of the Full Bench do not shew that, where on the pleadings or the facts found there are no equities which the other members have against the purchaser of the right of one of the members which can only be worked out in a general suit for partition, the suit for partial partition should be dismissed (see also *Hari Kistna Chowdury* v. *Lakshminarayana Pantulu.*[5] We may also observe that the decisions above mentioned were based on the view no longer maintained that a purchaser from an undivided member acquires nothing more than an equity to a partition. In our opinion a review of the case law on the question does not show that in a suit similar to the present case defendants are entitled to ask that the plaintiff's suit

1. (1889) I. L. R. 13 M. 275.
2. (1892) I. L. R. 16 M. 98.
3. (1896) I. L. R. 20 M. 243.
4. (1910) I. L. R. 34 M. 269 at p 275.
5. (1909) 20 M. L. J. 323.

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should be dismissed on the mere ground that the plaintiff has not included in his suit all the properties belonging to the family and the person whose rights he has purchased, and they establish the view that the other members can only claim if they like, as pointed out by Parsons, J. that there should be a general partition amongst all the members of the family, or that before the plaintiff is allowed the share in any specific property purchased by him, the equities as between the co-parceners, the rights of one of whom he has purchased, should be taken into account and adjusted. The principle applicable to such a case is the rule governing partition between tenants in common and not that regulating partition between members of an undivided family *inter se.* As the plea of the existence of any equities was not pressed in this case, we are of opinion that there is no ground for interfering in second appeal with the decree of the District Court.

We dismiss the second appeal with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[From the High Court of Bombay.]

Present:—Lord Macnaghten, Lord Atkinson, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Vassanji Khimji ... ... *Appellant.**

v.

Shapurji Burjorji Bharucha ... ... *Respondent.*

Vassanji Khimji v. Shapurji Burjorji Bharucha.

Document—Construction—Breach of contract.

A deed ran as follows :—" In consideration of your having at my request acceded to the preposal of the Secretaries, Treasurers and Agents of the Tricumdas Mills Company, Limited, to advance to the Mills, a sum of rupees one lac and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of eleven lacs of rupees as the first mortgage of the Mill's block property, and to pay to you thereout the said sum of rupees one lac and fifty thousand agreed to be advanced by you to the Mills."

Held on a construction of the deed that it amounted to a substantial undertaking that a loan should be procured by the executant and not merely that he would find somebody willing to lend and that he was to do nothing further except the payment to the adressee out of the loan a lac and a half if the arrangement were carried through.

Appeal from judgment and decree of the High Court of Bombay on appeal from a judgment and decree of the said High Court in its original civil jurisdiction.

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* 3rd May 1912.

Vassanji Khimji v. Shapurji Burjorji Bharucha

Their Lordships judgment was delivered by

Lord Macnaghten.—The question in this case turns simply upon the construction of a very short document. It is addressed to the appellants, and is in these words:—" In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers, and Agents of the Tricumdas Mills Company, Limited, to advance to the Mills a sum of rupees one lac and fifty thousand, I hereby bind myself to you to procure a loan within two weeks of eleven lacs of rupees as the first mortgage of the Mills' block property, and to pay to you thereout the said sum of rupees one lac and fifty thousand agreed to be advanced by you to the Mills."

Everybody is now agreed that what took place after the execution of that document can have no bearing on the construction of it. All that the admitted evidence shows is that the appellants wanted some real and substantial security for their advance. They advanced the lac and a half, and the only question is, what is the meaning of this guarantee? Does it mean that all that the respondent undertook was that he would find somebody willing to lend eleven lacs on a fisrt mortgage of the mill, and that he was to do nothing further except, if that arrangement was carried through, he would pay to the appellant out of the loan a lac and a half?

Various constructions have been suggested. The one which Sir Robert Finlay, for the respondent, finally adopted is the one on which the Judges in the appeal court relied. They say they agree with the respondent when he says "that all he had undertaken to do was to procure the lending of eleven lacs if a first mortgage of the Mills was given, and to pay thereout Rupees 1½ lacs to the plaintiff."

Their Lordships read the document not in that sense at all, but as a substantial undertaking that a loan should be procured, and that out of that loan this sum of Rs. 1,50,000 should be repaid.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, and that a decree should be made in favour of the appellants. Of course, the respondents will pay the costs of this appeal, and the costs below.

Lelteys and Hart, Solicitors for appellant.

T. L. Wilson and Co., Solicitors for respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson, and Mr. Justice Sundara Aiyar.

Sir Abhinava Purna Priya Vedaji Bhaskar Thirumal Rao Saheb. ... ... *Appellant.* (Defendant.)

vs.

Arni Rangadani Rao Saheb ... ... *Respondent.* (Plaintiff.)

Thirumal Rao Saheb. *v.* Rangadani Rao Saheb.

Hindu Law—Impartible Estate—Nature and incidents of ownership—Maintenance of member removed more than 3 degrees from common ancestor—Co-parcenary, limits of—Manu Ch. 9 Ss. 186, 187—Adopted son, status of—and relation to collaterals removed beyond 3 degrees.

An impartible estate retains the character of joint property for purposes of succession as well as for claims of the maintenance of those members of the family to whom it belongs for purposes of succession ; and claims to maintenance should depend on the question whether if the estate were partible the person claiming maintenance would be entitled to maintain a suit for partition. *Sartaj Kuari* v. *Deoraj Kuari*[1] and cases following it, explained and distinguished ;

Impartible estates and the character and incidents of the ownership of the holder therein considered in detail.

A Hindu who is removed by more than 3 degrees from the common ancestor is entitled, at any rate when there is no gap of 3 generations in any line of the co-parcenary, to take the family estate by survivorship on the extinction of the members of another branch descended from the common ancestor ; and consequently he is entitled to a partition of the same ; and if the estate is impartible, to maintenance from the holder of the impartible estate, though the latter is removed by more than 3 generations from the common ancestor of the claimant.

The rule is the same whether the claimant for maintenance is the natural son or an adopted son of his father.

An adopted son takes the place of the natural son for purposes of relationship and inheritance. S. 3 of the Dattaka Chandrika relates only to the performance of funeral rites by the adopted son and no more.

The limits of co-parcenary in the Mitakshara as stated in Manu Ch. IX Ss. 186 and 187 and the texts of Katyayana and Devala considered and criticized.

Appeal from the decree of the District Court, North Arcot, in Original Suit No. 20 of 1908.

P. R. Ganapathy Aiyar for appellant.

S. Srinivasa Aiyangar for respondents.

The Court delivered the following.

Judgment :—This appeal is by the defendant, the Jagirdar of Arni, in a suit instituted by the plaintiff to establish his right to receive maintenance from the defendant at Rs. 60 per month and for the recovery of arrears at the same rate from July 1905. The plaintiff,

*Appeal No 120 of 1910. 31st April 1912.

1. (1888) I. L. R. 10 A. 272.

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is the adopted son of one Lakshmana Rao Saheb who was the grandson of the plaintiff's grand-father's grand-father, Tirumal Rao, Saheb. Tirumal Rao had two sons, Srinivasa Rao and Venkata Rao. The defendant is the grand-son of Venkata Rao by adoption and the plaintiff is the great grand-son of Srinivasa Rao. The Jagir of Arni is an impartible estate descendible to a single heir according to the rule of lineal primogeniture and is included in the schedule to the Madras Impartible Estates Act. The plaint alleges that the Jagir is a joint ancestral hereditary estate of the family of the parties and is subject to the liability under the Hindu Law of providing for the maintenance of the other members of the family. It alleges further that whatever may be the nature of the estate, the defendant is bound to make suitable provision for the maintenance of the other members of the family according to the established usage. The plaintiff after the death of his father, Lakshmana Rao, made an application to the Court of Wards (which was then in possession of the estate on behalf of defendant) asking for the award of maintenance to him; but it refused to recognise his right and the Government confirmed the order of the Court of Wards. The defendant in his written statement denied that the Jagir was common family property out of which collateral male relations would be entitled to claim maintenance and contended that even if it were a joint impartible estate the plaintiff could not claim maintenance as he and the defendant were removed from each other more than three degrees from their common ancestor and the plaintiff was not in such a degree of relationship as would entitle him to claim partition if the estate were not impartible. The defendant also denied what he understood to have been alleged in the plaint that he was in possession of the other joint family property in addition to the Jagir. Other contentions were also raised by the defendant which it is unnecessary to refer to for the purposes of this judgment.

The District Judge in his judgment says "that the Jagir is an ancestral hereditary estate of the family is admitted. The plaint says that it is joint only in the sense that there has been no division in the family and that the members of the family are entitled to maintenance." He held that the remoteness of the relationship between the plaintiff and the defendant did not deprive him of the right to maintenance and that he was so related to the defendant that if the estate were partible he would be entitled to enforce partition. He also held that the Government Order which denied the plaintiff's right to maintenance did not affect him. In the result the

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lower Court decreed maintenance to the plaintiff at the rate of Rs. 55-8-11 a month and arrears to the period claimed at the same rate.

On appeal, Mr. Ganapathy Aiyar, the learned vakil for the appellant, repeated the contention urged before the lower Court that the plaintiff's relationship to defendant was not such as would entitle him to claim partition of the estate if it were partible. But he went further and urged a contention which is apparently opposed to the admission made by his client in the lower Court that the estate being impartible, it could not be held to be joint property of the family of the parties after the decision of the Privy Council in *Sartaj Kuari* v. *Deo Raj Kuari*[1] and that according to that decision the Jagir must be held to be the absolute property of each Jagirdar and not liable to the maintenance of any other member of the family on the footing of its being common family property. He went a step further and urged that apart from the result of the decision in *Sartaj Kuari* v. *Deo Raj Kuari*[1] the Jagir of Arni must be held to be the self-acquired property of the defendant and relied on the Judgment of this Court in Appeal Suit No. 25 of 1871 in a suit instituted by the plaintiff's adoptive father against the defendant's grandfather, Tirmal Rao, for maintenance. We are of opinion that the defendant should not be allowed to set up this new plea relating to the character of the estate owned by the defendant. It is no doubt true that in Appeal Suit No. 25 of 1871 this Court observed that "it had been conclusively adjudged by the decision in the former suit between the parties that the property is self-acquired by the defendant under a sannad" and awarded maintenance to Lakshmana Rao on the terms of sannad which bound the Jagirdar to provide for the maintenance of the members, of the family according to usage and the orders of the Government. The former suit referred to in Appeal Suit No. 25 of1871 was apparently Original Suit No. 76 of 1868. The view that then prevailed was that the holder of an unsettled palayam like Arni had no heritable proprietary right in the palayam and that each successive holder holds under a fresh title created by the gift of the Sovereign power. The view was set aside by the Judicial Committee of the Privy Council in *Marungapuri* case in *The Collector of Trichinopoly* v. *Lekkamani and others*[2] which decided that not withstanding the absence of a permanent settlement the holder of a such palayam might be the holder of a heritable estate. The previous decision of this Court in Appeal Suit No 25. of 1871 proceeded therefore on a view of the law which is no longer supportable. The defendant's contention is

1 (1888) I. L. R 10 A. 272. 2. (1874) 1 I. A. 282. 14 B. L. R. 115.

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contrary to his own statement in Exhibit F, the plaint in a suit instituted by him against the Secretary of State for India in Council, in which he stated that the Jagirdar of Arni is the ancestral hereditary estate of this plaintiff and has been held by him and his successors in hereditary proprietary right." It is also, as already mentioned, contrary to his explicit admission in the lower Court in this case. We have no doubt that the contention is entirely unsustainable. But whatever its merits may be, we cannot permit the defendant to raise it here on appeal, especially as the question is not one purely of law.

Another contention, admittedly not raised in the lower Court, is that whatever might be the former tenure of the Jagir the defendant is now holding under a fresh sannad, dated 14th April 1909, according to the terms of which the defendant is bound to give maintenance only when he is required to do so by the established usage of his estate and when in addition the Government directs him to do so. Assuming that there is any substance in his contention based on a consideration of the new sannad we must disallow it apart from the question whether the Government had any power to affect the plaintiff's rights by a sannad granted to the defendant.

It is perhaps doubtful whether we should allow the defendant to go back to any extent on the admission made by him in the lower Court that that Jagir is an ancestral, undivided hereditary estate of the family. It was made with full knowledge of the decision of the Privy Council in *Sartaj Kuari* v. *Deo Raj Kuari*[1] But as the argument purports to be based on a necessary legal inference from the decision of the Privy Council, we propose to deal with it briefly. In that case the Judicial Committee held that an alienation made by an impartible Zemindar in the North-Western Provinces could not be disputed by his son who would be entitled to succeed to the estate on the death of the alienor and the rule laid down there has been subsequently held by the Privy Council in *Sri Raja Rao Venkata Surya Mahapati Ramakrishna Rao Bahadur* v. *The Court of Wards*,[2] to be applicable to the impartible estates in this Presidency. In *Sartaj Kuari* v. *Deo Raj Kuari*[1] their Lordships held that "the son of a holder of an impartible estate has not such a right by birth in the estate as would entitle him to interdict an alienation made by his father. They observed that the property in the paternal or ancestral estate acquired by birth under the Mitakshara Law is in their Lordships' opinion so connected with the right to a partition that it does not exist when there is no right

1. (1888) I. L. R. 10 A. 272. 2. (1898) I. L. R. 22 M. 383.

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to it." They were of opinion that "the foundation of the supposed restriction on the power of a father to make an alienation was the community of interest which the members of the family acquired by birth and that a right by birth did not exist where partition could not be enforced." Various decisions were cited before their Lordships in support of the position that all the members of the family have such a joint right in an impartible estate as to entitle them to object to the alienation by the holder for the time being. But their Lordships observed that the expressions in previous Judgments of the Privy Council to the effect that the Zamindari though impartible was "part of the common family property." See *Sivaganga* case,[1] *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumala Boochia Venkondora*,[2] or in a sense the joint property of the joint family (see *Periasami* v. *Periasami*,[3]) must be understood as having been made with reference to the question of succession and that though an impartible estate may for some purposes be spoken of as joint family property the co-parcenary in it which under the Mitakshara Law is created by birth does not exist. It is strongly urged for the appellant that there is in their Lordships' judgment a clear pronouncement of the absence of all co-parcenary in an impartible estate and that therefore no right to maintenance could be claimed by a member of the family on the ground that the estate is the joint property of the family. (But the language of their Lordships seems to show clearly that they were then speaking of the absence of a co-parcenary which would entitle the co-parceners to partition and to prevent alienations by the holder. For they do not disapprove of the estates being spoken of as joint for purposes of succession. The subsequent decisions of the Privy Council clearly show that where a question of succession is concerned, an impartible estate may be regarded as joint and governed by the rules of succession applicable to joint property. The appellant's contention is, that, in consequence of the view enunciated in *Sartaj Kuari* v. *Deo Raj Kuari*,[4] the existence of co-parcenary can only be regarded as a legal fiction for the purpose of determining the heirs of an impartible estate and not as a fact from which any other deduction can be made as a consequence flowing from it. But this argument appears to us to be altogether untenable. In the first place the heir to an impartible estate has to be determined in the same manner as to partible property according to the actual nature of the property in question after finding out whether the property was separate property of the deceased holder and therefore descendible to his own heirs, that is to

1. (1863) 9 M. I. A. 543.
2. (1870) 13 M. I. A. 333.
3. (1878) I. L. R. 1 M. 312 (P. C.)
4. (1888) I. L. R. 10 A. 272.

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his issue up to the third generation and then to his widow and daughter and daughter's son and in default of any of these to the agnate and cognate relations of the deceased. It would be immaterial as laid down in *Katama Natchiar* v. *The Rajah of Sivaganga*,[1] whether the deceased was a member of an undivided family or not. The succession to the property depends on the nature of the deceased's right to it and not on the status of the family to which he belonged. To find out the heir therefore the question has to be definitely answered whether the property belonged to himself either as his self-acquisition or as his ancestral property which devolved on him as single heir or whether it was the joint property of himself and other members of an undivided family. The line of succession in each case is different. In the former case, it goes to the deceased's own heirs, in the latter, it goes, in the absence of any issue, by survivorship to the eldest member in the next senior line of the undivided family to whom the estate jointly belonged, though held in possession only by a single person. For this purpose again it has further to be discovered who are members of the joint family to which the estate belongs. If, at any time, the members of the family then existing became completely divided in status with regard to all their property, including the impartible estate, then none of those branches that became so divided from the branch to which the deceased belonged would be entitled to succeed so long as there are any members in the branch or branches which subsequently continued to remain undivided with respect to the estate with the branch to which the deceased belonged. When it is necessary to determine whether the property in fact belonged to the deceased alone or not and if it did not belong to him alone what individuals constituted the undivided family to which it belonged and what individuals cannot be regarded as members of this family, it seems quite unintelligible to speak of determining the heir by means of any fiction. Facts which have been ascertained can no longer constitute a fiction; nor would the fiction of an undivided family enable the court to determine the individuals who must be regarded as having constituted the family to which the estate belonged. It would not be enough to find out with what persons the deceased or his ancestors were undivided at the time that the estate was first granted; for, though the family may be undivided at the time, the estate might still be separate property of the person to whom it was granted and descend to his own heirs. But notwithstanding this, when it has once made a des-

1. (1863) 9 M. I. A. 543.

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cent it would become the undivided property of all his successors. It might again at any point of time become the separate property of one member and again resume the character of undivided property in the hands of his successors. And the rule of succession would vary according to the nature of the right of each holder depending on the changes in the condition of the family. All this seems to make it impossible to hold that all conception of joint property is destroyed with regard to impartible estates by the decision of the Privy Council in *Sartaj Kuari* v. *Deo Raj Kuari*,[1] the Privy Council has not really encouraged any such notion of the extinction of joint property with respect to them. In *Raja Jagendra Bhupati Harri Chundun Mahapatra* v. *Nityanund Mansingh*,[2] which was decided by their Lordships shortly after *Sartaj Kuari* v. *Deo Raj Kuari*,[1] their Lordships held that where a Zamindar left a legitimate son and two illegitimate sons and the legitimate son who succeeded subsequently died, the elder illegitimate son succeeded to the estate, by virtue of survivorship, a rule which would not apply unless the estate was the joint property of all the three sons both legitimate and illegitimate of the previous holder. Sir Richard Couch who delivered the Judgment both in this case and in *Sartaj Kuari* v. *Deo Raj Kuari*[1] does not speak of the joint ownership being a fiction. In *Immudiapttam Tiruguane Kondima Naik* v. *Periya Dorasami*,[3] decided in 1900 their Lordships speak of the Ayakudi Zamindari as "a joint estate, though impartible" of the family. In the *Udayarpalayam* case,[4] where the question related to the succession to the impartible Zamindari of Udayarpalayam which was claimed both by the heir to the separate property of the deceased Zamindar and by persons who would be entitled to succeed by survivorship in case the estate was joint family property, their Lordships observed "It is settled in accordance with a ruling of this Board that when impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line a position held by the principal respondent," and approved in the judgment of this Court in *Naraganti Achamma Garu* v. *Venkatachalapathi Nayanivaru* [5] where the estate was held to be joint property. In *Sri Rajalakshmi Deva Garu* v. *Sri Raja Suryanayane Dhatrazu Bahadurgaru*.[6] Lord Davey in delivering the Judgment of their Lordships, speaks of the estate held by the holder of an impartible Zamindari in these terms. "Even if impartible, it may still be part of the com-

1. (1888) I. L. R. 10 A. 272.
2. (1890) I. L. R. 18 C. 154 (P. C.)
3. (1900) I. L. R. 24 M. 377.
4. (1905) I. L. R. 28 M. 508.
5. (1881) I. L. R. 4 M. 250
6. (1897) I. L. R. 20 M. 256.

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mon family property and descendible as such in each case; the widow's estate of the appellant would be excluded. The real question therefore is whether it has ceased to be part of the joint property of the family of the first Zamindar or (in other words) whether there has been an effectual partition so as to alter the course of descent." In *Ram Nundu Singh* v. *Janki Koer* [1] their Lordships (through Lord Davey again) speaking of the succession to the Bettiya estate by a brother of the deceased Zamindar said " but it appears that he was joint in estate with his brother and therefore was entitled to succeed him in the family property by survivorship." Having regard to these pronouncements of the Privy Council it is unnecessary to make citations from the decisions of the High Courts but we may refer to a sentence in *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai*[2] " In determining who the single heir is according to these principles we have first to ascertain the class of heirs who would be entitled to succeed to the property if it were partible *regard being had to its nature as a co-parcenary or separate property* and we have next to select the single heir by applying the special rule indicated above." If then an impartible estate retains the character of joint property for purposes of succession, does it not do so where the question relates to the rights of maintenance possessed by the members of the family to whom it belongs for purposes of succession? There can be no doubt and it is not questioned that until the decision in *Sartaj Kuari* v. *Deo Raj Kuari* [3] the right to maintenance on the part of the other members of the family was based on their joint right to the estate and to be a substitute for the right to partition which they would possess if the estate were partible. The Privy Council has affirmed that basis of the right to maintenance subsequent to *Sartaj Kuari* v. *Deoraj Kuari*,[3] In *Raja Yarla Gadda Mallikarjuna Prasada Nayudu* v. *Raja Yarla Gadda Durga Prasada Nayudu*, [4] the younger brothers of a Zamindar had obtained partition of the joint property of the family except the Zamindari of Devarakota which was held to be impartible. They subsequently sued for maintenance out of the Zamindari. The Privy Council observed " Their Lordships fully agree with the High Court that the family of the parties to the present action has not become a divided one in consequence of the proceedings in the previous suit to which reference has already been made. It is true that in that suit a decree was made for the partition of a portion of the family

1. (1902) I. L. R. 29 C. 828.
2. (1894) I. L. R. 17 M. 316 at p. 325.
3. (1887) I. L. R. 10 A. 272.
4. (1900) I. L. R. 24 M. 147.

property but it was a very inconsiderable portion and had no relation whatever to the Zamindari estate. As to the Zamindari estate, this Board held that it was impartible, and the consequence is that the plaintiffs as younger brothers of the Zamindar retain such right or interest in respect of maintenance as belonged to the junior members of a Raj or other impartible estate descendible to a single heir." The right to maintenance was vested by them on the same basis in the *Udayarpalayam* case already referred to. In *Sartaj Kuari* v. *Deoraj Kuari* [1] itself their Lordships made citations from previous cases which based the right to maintenance on the estate being joint property (see pp. 286 and 288, *Sivagnana Tevar* v. *Periasami*[2] *Yenumala* v. *Yenumala*,[3] *Baboo Beer Pertale Sahee* v. *Maharaja Rajendar Pertab Sahee* [4]. In *Maharana Shri Fatesangji Jasvantsanii* v. *Kuvar Harisangji*, [5] the Bombay High Court regarded the right to maintenance as standing in lieu of the right to partition. See also *Himmatsing Becharsing* v. *Ganapatsing* [6] and *Ramachandra Sakharam Vagh* v. *Sakharnm Gopal Vagh*,[7] In *Laliteswar Singh* v. *Bhaleswar Singh*,[8] *Brett*, J., observes "In consequence of the incidents of primogeniture and impartibility which by immemorial custom attached to the Raj they lose their right to enjoy a share of the family property but as compensation for that loss they are entitled to receive from the Raja certain portions of the landed property of the Raja as *babuana*, grant for the maintenance of themselves and their descendants in the main line." In *Venkatachella Reddiar* v. *Venkatachella Reddiar* [9] *Wallis* and *Sankaran Nair* JJ. held that the right to maintenance as it was understood to exist before *Sartaj Kuari* v. *Deoraj Kuari*[1] was not affected by the judgment in that case. We have therefore no hesitation in holding that the plaintiff's right to maintenance must be decided on the footing of the estate being joint property and must depend on the question whether if the estate were partible the plaintiff would be entitled to maintain a suit for partition. Much reliance has been placed by the learned vakil for the appellant on certain decisions of this Court with regard to the question whether the successor to an impartible estate takes it as part of the effects of his predecessor. The question there did not relate to the right to succession or to maintenance. The decision in *Sartaj Kuari* v. *Deoraj Kuari*[1] has no doubt introduced an anomalous state of matters. Where an impartible

1. (1887) I. L. R. 10 272. 2. (1878) I. L. R. 1 M. 312 (P. C.)
3. (1870) 13 M. I. A. 333. 4. (1867) 12 M. I. A. 1.
5. (1894) I. L. R. 20 B. 181. 6. (1875) 12 B. H. C. R. 94
7. (1877) I. L. R. 2 B. 346. 8. (1908) I. L. R. 35 C. 823,
9. (1909) 20 M. L. J. 394.

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estate is the joint property of the family the members other than the holder for the time being have no such estate by birth as to entitle them to interdict an alienation by him. For purposes of alienation the holder has all the powers of an exclusive owner. Is successor then liable for all his debts as if he succeeded to his absolute property? On this question a conflict of view exists among different Judges of this Court and of the other High Courts. See *Veera Soorappa* v. *Errappa Naidu* [1] *Nachiappa Chettiar* v. *Chinnayasami Naicker* [2] *Ramasami Naik* v. *Ramasami Chetti* [3] *Raja of Kalahasti* v. *Achigadu* [4] *Harpal Singh* v. *Bishan Singh* [5] *Harpal Singh* v. *Bishan Singh* [6] *Kali Krishna Sankar* v. *Raghunath Deb.* [7] and *Ram Dass Marwari* v. *Tekait Braja Behari Singh,* [8] *Sivagnanam Servaigar* v. *Ramasawmy Chettiar* [9]. We think it unnecessary to consider these decisions for the purpose of deciding the question of the right to maintenance with which we are concerned in this case. In the view we have taken it is unnecessary to consider Mr. Ganapathi Aiyar's contention that if the plaintiff has no right to maintenance on the ground of the Jagir being joint family property and not the exclusive property of the defendant he would not be entitled to it otherwise under the texts of the Hindu Law giving special rights of maintenance to various persons and decisions based on them.

We now proceed to deal with the question whether on the footing that the plaintiff's right to maintenance is to be regarded as flowing from his membership of the joint family to which the Jagir must be regarded as belonging, he is disentitled to it on the ground that he is too remote in relationship to the defendant. M. Ganapathi Aiyar's contention on this point is that the plaintiff is more than three degrees removed from Tirumal Rao Sahib from whom both he and the defendant are descended and that he is therefore not a joint owner of the Jagir; and reliance is placed on two texts of Kathyayana and Devala respectively and on Manu, Chapter IX sections 186 and 187 as well as on the writings of various commentators who have accepted these texts as authoritative. It is admitted that this argument is opposed to the decision of this Court in *Gavuridevamma Garu* v. *Ramandora Garu,* [10] as well as to the decision of the Bombay High Court in *Moro Vishvanath* v. *Ganesh Vithal,* [11] and that it is not supported by

1. (1906) 16 M. L. J. 499.
2. (1906) I. L. R. 29 M. 453.
3. (1907) I. L. R. 30 M. 255.
4. (1907) I. L. R. 30 M. 454.
5. (1909) 6. A. L. J. 753.
6. (1911) 8 A. L. J. 1251.
7. (1903) I. L. R. 31 C. 224.
8. (1902) 6 C. W. N. 879.
9. (1911) 22 M. L. J. 85.
10. (1870) 6 M. H. C. R. 93.
11. (1875) 13 B. H. C. R. 444.

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any decided case. It is argued that the decision of this court is based on a misapprehension of a text of the Mitakshara and that both the decisions are contrary to the rule propounded in the texts of Hindu law. The decision in *Gavuridevamma Garu* v. *Ramandora Garu*[1] related to the question of succession to an impartible estate, the question being whether the plaintiff in the suit was a co-parcener who would have been entitled to partition if the estate were partible. In the Bombay case the question was whether the plaintiff was entitled to decree for partition. It is admitted that the degree of relationship for determining the right to maintenance must be taken to be the same as for determining the right to partition in the case of a partible estate. The texts mentioned above are relied on to determine the persons who are entitled to demand partition when the family is undivided. It is desirable to set out these texts. They are as follows:—Manu Sloka 186 "To three (ancestors) water must be offered. To three the funeral cake is given. The fourth (descendant is) the giver of these (oblations). The fifth has no connection (with them)." Sloka 187. "Always to that (relative within three degrees) who is nearest to the (deceased) sapinda the estate shall belong. Afterwards a Sakulya shall be (the heir, then) the spiritual teacher or the pupil."

Kathyayana: "When one himself dies unseparated, his son who has not received maintenance from the grandfather shall be made participator of the heritage. He is to get therefore the paternal share from the uncle or uncle's son. The very same share shall equitably belong to all the brothers or his son also shall get. Afterwards cessations (of succession) takes place." The commentators explain that "his son" means the great grand-son of the person whose estate is divided because the case of a grand-son is considered and it is stated that the great grand-son's son is not entitled to any share. See Viramitrodaya Chapter II, Section 16. The Smriti Chandrika, the Madhavya, the Vivada Chintamani, the Vivada Ratnakara and Apararka's commentry on Yagnavalkya have all been relied on as adopting the text of Kathyayana. It may be noted that the Vivada Ratnakara does not note the portion stating that the property does not descend below the great grandson. Devala as cited by the Viramitrodaya runs thus: "Partition of heritage among undivided parceners and second partition among divided parceners dwelling together extends to the fourth in descent. This is the settled law." The Viramitrodaya interprets it thus: "the meaning is that partition of heritage extends to the fourth

1. (1870) 6 M. H. C. R. 93.

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degree from the proprietor." This rule is alike applicable if co-parceners dwell together in re-union by reason of the expression, 'dwelling together.' The appellant's vakil would restrict the right to partition to Tirumal Rao's son and grand-son and a refuse is to his great grand-son the plaintiff. This does not seem to be in accordance with the interpretation of Kathyayana's text by the commentators, for the plaintiff would be great grand-son of Tirumal Rao who, according to the commentators, would be entitled to a share; the three degrees having to be counted from Tirumal Rao's son. Apart from this, however, the question is whether the texts have any application to the right of partition in a family where the descendants of various branches are living together as members of one family, or whether they do not refer merely to the mode of division of the estate of a certain person amongst those who are entitled to take as his heirs, that is to cases where the question for determination is who are the heirs entitled to take a person's estate as his heirs and to divide it between them. Could they apply where a share in the estate is not claimed as the heir of a particular individual but as one of the members of a family of co-parceners all living together in joint enjoyment of the estate. The principles accepted of the Mitakshara school of law is that in the case of ancestral property a person's son, grand-son and great grand-son acquire a right by birth in it. Now suppose three or two co-parceners, A and B jointly owing to certain ancestral property. The son, grand-son and great grand-son of each of them could acquire a right in the property by truth. A's son having a right in the property would not the son's great grand-son also acquire a right by birth in the right that he has and similarly would not B's son's great grand-son acquire a right in his interest? No doubt, if the property belongs to A or B, then no doubt any descent of either below the third degree will not obtain a right by birth in it. But after A and B have sons born to them, how can their ancestral property be regarded as the property of A and B alone and not of their sons also? The texts cited refer in terms only to division among those who take as the heirs of a certain person of property which is regarded as belonging to him. Partition was ordinarily enforcible in ancient times by sons as against each other only after the father's death, though it was open to the father to make a division amongst his sons or to divide away any one of them at his pleasure. If he died without making a division and his issue all remained joint at his death and the question was who were entitled to divide what was regarded as his estate, the texts mentioned above lay down the rule applicable to such a case. Whether in the case of a person being

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the sole holder of ancestral property, it was regarded as belonging to him so as to make any restriction in the class of descendants who would be entitled to claim a share when the family continued undivided at his death, it is not necessary to consider. It is unlikely that it would be so regarded now. But, at any rate, where ancestral property belongs to two persons subject to the incident of survivorship as between them, it is very unlikely that it was ever regarded as property of either of them so as to make the texts applicable. The Hindu Law does not contemplate the necessity of division taking place at any time. Suppose five generations descended from several brothers live together, they are all maintained out of the joint family property, the members of the fifth generation being quite as much in enjoyment thereof as those of the higher generations. It may be that some of them take part in the actual management of the property; they may be utilising a part of it for some business carried on on behalf of the whole family. Now, if in any one branch all members up to the fourth generation should happen to die, is it to be said that the members of the fifth generation who were till then in the joint enjoyment would cease to be entitled to any right in the property? The principle applicable to such a case is really that applicable to joint owners and seems to have nothing to do with any rule of Sapindaship. Again, if the texts in question are to be applied, it is by no means easy to determine from whom the generations are to be counted. If, at any point of time, the estate vested in a single person, it may be suggestsd that the counting should be from him: but what if it is not possible to trace any single individual in whom it was vested within living memory. No assistance can be derived from the texts in such a case. Nor is the matter free from difficulty even where such a person can be got at. Suppose A has two sons, B and C; and each of them has several generations of issue, B1, B2, B3, B4, C1, C2, C3, and C4. Suppose B, B1, B2, and C, C1, and C2 are all dead, then according to the texts if the descent is to be cast from A, neither B3 and B4 nor C3 and C4 would have any right to A's estate. The last texts do not provide for any one else being taken as the starting point from which the descent is to be cast, although an attempt was made in the Madras case to introduce another rule, to which we shall presently refer. Not text-writer has been cited who has applied the rule to determine the limits of coparcenary right where several generations of co-parceners have been living together as one family. Chandeswara says that Kathyayana's text is applicable only when partition not having been made, property, not enjoyed by one co-heir is solely enjoyed by another resi-

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ding in the same province; that is, the rule is one of limitation for the right to enforce partition when the co-parcener claiming it has not been in joint enjoyment, the period of limitation being not a certain number of years, but be determined with reference to the number of generations that have been out of possession. Subodhini, a commentary on the Mitakshara, seems to admit that the right to partition may be carried on even beyond the great grandson. See West and Buhler, p. 652 and Stokes's Digest of Hindu Law Books p. 365. According to the Vyavahara Mayuka the text of Devala is applicable only while separated co-parceners live together. A longer period of limitation seems to have been allowed where the branch claiming partition was not living in the same province. In such a case, the right to claim partition was allowed for six generations after the original owner. See Colebrooke's Hindu Law, Vol II, page 512, Sir. T. Strange's Hindu Law, pages 327 and 396 and also T. L. Strange's Manual of Hindu Law para 347. In the Bombay case already referred to *Moro Visvanath* v. *Ganesh Vittal*,[1] one Nahav was the original acquirer of the property. The plaintiffs who claimed partition were beyond, while the defendants were within, the fourth degree from him. The plea on the merits was that the parties had been in a state of separation for 50 years: but it was also urged by Mr. Mandlik that after three steps of descent from the acquirer of the family property, a claim to partition would cease. This contention was not accepted. West, J. observed "where two great grand-sons lived together as a united family, the son of each would, according to the Mitakshara Law, acquire by birth, a co-ownership with his father in the ancestral estate; yet, if this argument is sound, this co-ownership would pass altogether from the son of A or of B, as either happened to die before the other. If a co-parcener should die leaving no nearer descendant than a great grand-son, then the latter would, no doubt, be excluded at once from inheritance and from partition by any nearer heirs of the deceased, as, for instance, brothers and their sons; but where there has not been such an interval as to cause a break in the course of lineal succession, neither has there been an extinguishment of the right to a partition of the property in which the deceased was a co-sharer in actual possession and enjoyment." The case put by the learned Judge seems to be one where the *acquirer* survives three generations of issue living in commonsality with him; in such a case, no doubt, the fourth generation of issue would not acquire any right in the property which is his own. The learned Judge does not deal with the case where the

1. (1873) 10 B. H. C. R. 444.

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property is ancestral. The case was actually decided on the ground that the family must be regarded as having been divided. Nanabhai Haridas, J. refers to the texts of Kathyayana and Devala and criticises the interpretation put on the latter by the Mayukha which regards it as applicable to the case of re-united co-parceners only. He concludes "Upon a consideration of the authorities cited, it seems to me that it would be difficult to uphold the appellant's contention that a partition could not, in any case (other than that of absence in a foreign country) be demanded by descendants of a common ancestor, more than four degress removed, of property originally descended from him." He says that persons beyond the fourth degree would also be entitled to demand partition in such a case unless the three generations immediately below the person from whom it descends died before him. If the acquirer dies and the property vests in others, the issue of the latter also would acquire a right by birth." He does not say, however, that, where the property is not owned by a person solely but along with others, the mere fact that a co-parcener, in one line descended from him is more than three degrees removed from him or from any descendant in that line, would destroy the right to claim a partition along with the co-parceners in another line. The case is no authority for any limitation to the right to partition where serveral generations of different lines have always lived together. In the Madras case, the plaintiff who claimed to succeed to an impartible estate was the nearest sapinda of the deceased holder. The plaintiff was the sixth in descent from one Bapam Dora who was the acquirer of the Zamindari. The deceased holder was one degree further removed from him in the line of descent. It was contended that the plaintiff was not entitled to succeed to the estate and that the deceased holder's widow was the proper heir. This contention was negatived. The learned Judges Scotland C. J. and Innes, J., held that, the family being undivided, the widow had no title. They rejected the contention that only near sapindas of the deceased, that is, sapindas within three generations, were joint owners of the estate. They say "the limit of the co-heirs must be held to include undivided collateral relations, who are descendants in the male line of one who was a co-parcener with an ancestor of the last possessor. For, in the undivided co-parcenary interest, which vested in such co-parcener, his near sapindas were co-heirs and when, on his death, the interest vested in his son, or other near sapinda in the male line, the near sapindas of such descendants or descendant became in like manner co-heirs with them or him, and so on, the co-heirship became extended, the near sapindas down

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to the last descendent. This would practically let in all the descendants without any limitation of degree. They then go on to say "obviously, therefore, as long as the status of non-division continues the members of the family who have, in this way, succeeded to a co-parcenary interest are co-heirs with their kindred who possess the other undivided interests of the entire estate, and one of such kindred and his near spaindas in the male line cannot be the only co-heirs, until by the death of all the others without descendants in the male line to the 3rd degree, he has, or he and they have, by survivorship acquired the entire right to the heritage as effectually as if the estate had passed upon an actual partition with the co-heirs."

Mr. Mayne understands the last passage to import that the continuance of the co-parcenary interest is subject to the condition that "no person who claims to take a share is more than 3 steps removed from a direct descendant who has taken a share. Whenever a break of more than three degrees occurs between any holder of property and the person who claims to take next after that holder, the line ceases in that direction and the survivorship is confined to those collaterals and descendants who are with in the limit of 3 degrees." The learned author seems to overlook the fact that each descendant as soon as he is born takes a share in what is already vested in his own father and he has not got to claim it as the share of a person more than 3 degrees removed from himself. When the son, grand-son and great grand-son of a co-parcener A die leaving a son of the great grand-son, the shares vested also in them have already been vested the son of the great grand-son and do not return completely to their ancestor, A. It appears to be doubtful whether the learned judges of this Court meant to lay down that the property would go entirely to another branch although descendants in a lower degree than the 3rd might be left in one branch. At any rate, such a view does not seem to be countenanced by the texts relied on. G. C. Sarkar in his work on Hindu Law, 3rd Edition, page 196, says that "A male descendant in the male line, however low in descent acquires a right by birth to both ancestral and self-acquired property of a paternal ancestor," and he proceeds to say that "if the 3 intermediate descendants were to die during the life-time of the owner of an ancestral property, the rights of the 4th descendant would not be in the least affected by that circumstance." The rule, he says, would be different if the paternal ancestor is separated from his descendants and not re-united with any of

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them and there is no son or grandson or great grand-son alive at the time of his death but only great great grand-son." In *Naraguntí Lutchmee Devamah* v. *Venjama Naidooo*[1] a claim of heirship to an impartible palayam by a collateral relation in the 4th degree of descent from the common ancestor was upheld against the widow, the deceased owner being a descendant of the 5th degree; but it was observed in *Gavuri Devamma Garu* v. *Raman Dora Garu*,[2] that there was apparently some special circumstance in the case which would make it possible to contend that the question was not directly decided by the Privy Council. In *Ratna Daher* v. *Modhoo Soodan Mahapatur*,[3] the Calcutta High Court held that an unseparated grand-father's great grand-son's grand-son would exclude a widow from inheriting the estate and *Govuridevamma* v. *Ramandora Garu*, was relied on in support of the position. It is, of course, unnecessary for the purpose of this case to decide whether a gap of 3 generations in any one line of coparceners would prevent the lower descendants of that branch from claiming a share of the co-parcenary property as there was no such gap in this case. According to the principles and texts of the Hindu Law, such a gap would not affect the rights of descendants of the 4th and other generations. We see, at any rate, no ground for countenancing the contention that, even where there is no such gap, the descendants of persons removed more than 3 degrees from an ancestor are not entitled to take by survivorship on the extinction of the members of another branch descended from him. Such a rule derives no support from the writers on Hindu Law and is inconsistent with the principles of that law and un workable in practice besides being admittedly opposed to the authority of decided cases. We therefore hold that the plaintiff in this case would not be disentitled to partition if the estate were partible and is therefore not disentitled to maintenance.

But, then, it is argued that, although this rule might be correct if the plaintiff were the aurasa son of his father, the position is different, as he is an adopted son, because it is urged that in the case of an adopted son the sapinda relationship extends only to three degrees in the adoptive family and that therefore the plaintiff is not a sapinda of the defendant. In support of this, reliance is placed on the authority of Dattaka Chandrika, S. 3 Pl. 18 to 24 and of Dattaka Mimamsa C. 6 Pl. 32 to 38. It is not necessary to deal with this argument at any length because it is opposed to the authority of the Mitakshara,

1. (1861) 9 M. I. A. 66. 2. (1870) 6 M. H. C. R. 93
3. (1878) 2 C. L. R. 328.

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chapter I, section 11, Pl. 30 and 31 according to which an adopted son, being one of the six superior classes of sons, takes the inheritance of his father's sapindas and samanodakas. Besides, the question is, in our opinion, really concluded by the decisions of the Courts. The texts were examined at great length by Hobhouse, J. in a Full Bench decision of the Calcutta High Court, *Gurugovind Sehamandal* v. *Anendlal Ghose Mazumdar*[1] and it was pointed out that the provisions of section 3 of Dattaka Chandrika apply to the adopted son *quoad* the performance of funeral rites and these only. Verse 1 of the section expressly says. "Next, the funeral rights, performed by a son given, are determined." The subject of inheritance is treated in section 5. In that section it is expressly laid down that an adopted son is a heir to the kinsmen of the adoptive father where he is possessed of good qualities. The possession of good qualities is not now insisted on as a condition precedent to the right to the inheritance. Shyamacharan Sircar has elaborately examined all the original authorities on the question in his Vyavastha Chandrika. Manu Baudhayana, Gautama, Kalikapurana and Brihaspati are all cited as authorities in favour of the adopted son's right to inherit to the kinsmen of the adoptive father; the authority of Sir William Macnaghten and of the author of Dvita Nirnaya as well as the opinions of the Pandits are referred to in support of the opinion. The Mitakshara is also construed as supporting the claim of the adopted son to stand in the same position as an aurasa son. Mr. Ganapathi Aiyar has contended that verses 30 and 31 of section 11 of the Mitakshara have been mistranslated by Colebroke and that verse 31 does not in reality declare the adopted son's right to succeed to the sapindas and samanadakas of the adoptive father but only declares him in conjunction with the five other superior classes of sons to be both a heir and a kinsman of the father. We are altogether unable to accept this contention. Kullukha Bhatta, one of the commentators of Manu, has interpreted the text of Manu expounded by Vignaneswara in verses 30 and 31 in the sense in which those verses have been translated by Colebrooke and the author of Vyavastha Chandrika has also understood the verses in the same sense. See pages 179 and 180. In *Tara Mohun Bhuttacharjee* v. *Karipa Moyee Debia*,[2] an adopted son was held to be entitled to succeed to the estate of a collateral who was 5th in degree from the common ancestor. The learned Judges Loche and Hobhouse, JJ. observed: "With regard to the question of right of an adopted son to succeed collaterally as well as lineally," we think it sufficient to quote the Privy Council Decision in the case of Shumboo Chunder Chowdry,

1. (1870) 5 B. L. R. 40. 2. (1868) 9 W. R. 423.

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Sutherland's Privy Council Judgments 25, which ruled that, according to the authorities on Hindu Law and the weight due to them, an adopted son succeeds not only lineally but collaterally to the inheritance of his relations." In *Paddo Kumaru Debee* v. *Jaggath Kishori Acharjee*,[1] the Calcutta High Court again held that the adopted son succeeds to the sapinda kinsmen of his father and that as regards the relationship of sapindas there is no difference between the adopted son and the natural son. On appeal the Judicial Committee of the Privy Council took the same view. See *Padmakumari* v. *The Court of Wards*.[2] In *Mokundo Lal Roy* v. *Bykunt Nath Roy*,[3] Morris and Prinsep, JJ. held that an adopted son was not precluded from inheriting the estate of one related lineally, although at a distance of more than 3 generations from the common ancestor. In *Dinonath Mukerjee* v. *Gopal Churn Mukerjee*[4] an adopted son who was 4th in degree from the common ancestor was held to be entitled to inherit to a collateral agnate and it was also held that the position of an adopted son was identical with that of an *aurasa* son in matters of inheritance. See also the Dattaka Mimamsa section 6, Pl. 53, Vyavastha Dharpana page 967. The decided cases have all been collected in G. C. Sircar's work on Adoption, pages 305 to 307. Our conclusion is that the plaintiff's rights stand on the same footing as if he were an *aurasa* son of Lakshmana Rao. In the result the decree of the lower Court awarding maintenance to plaintiff must be affirmed. We cannot agree with the contention that there is any admission of the plaintiff restricting the right to maintenance to three generations. We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar *

Zamindar of Pachipenta ... ... *Petitioner.*†

v.

Maharajah of Jeypore ... ... *Respondent.*

Zamindar of Pachipenta v. Maharajah of Jeypore.

Execution Sale—Purchaser's right—Sale Certificate—Construction of—Area—Boundaries and name—Determining factor.

The mere drawing up of a sale certificate to be given to a purchaser in court sale is not a judicial order binding on any party ; though an order passed on adjudication on the question as to what the sale certificate should contain will be a judicial order.

Under Cl. 31 of the Agency Rules, a petition lies to Government to revise orders passed by the Agent in execution proceedings.

1. (1879) I. L. R. 5 C. 615.
2. (1881) I. L. R. 8 C. 302 (P. C.)
3. (1880) I. L. R. 6 C. 289.
4. (1885) 9 C. L. R. 379.

* C. M. P. No. 2421 of 1909.

†21st March 1912.

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When two descriptions of the subject matter of a grant *i.e.*, the boundaries and area, conflict with each other and when there are two conflicting parts of the same description, that which is the more certain, stable and the least likely to have been mistaken or inserted inadvertently must prevail, if it sufficiently identifies the subject matter. This is not a rule of law and hence inflexible in its character; but it is a mere rule of construction which serves as a safe and almost infallible guide in determining the intention of the parties which is the touchstone of interpretations.

Held that in the particular case before their Lordships where the question was whether the property sold in execution included the hamlets or not, the determining factor was the name of village and that the property sold included the hamlets.

It is unsafe and inexpedient for the executing court in a case where there can be no possible doubt to leave the question as to what was intended to be sold unsettled, when it is sure to be made an occasion for future disputes.

Petition referred to the High Court by the Government of Madras under Rule 31 of the Agency Rules of Ganjam and Vizagapatam presented againt the Order of the Agent to the Governor at Vizagapatam, dated 1st July 1909 in E. P. No. 1 of 1906 in O. S. No. 1 of 1903.

K. Srinivasa Aiyangar for petitioner.

B. N. Sarma for respondent.

The Court made the following

ORDER :—

This case arises out of a petition to the Government of Madras which was referred to this Court under Rule 31 of the Ganjam and Vizagapatam rules under Act XXIV of 1839 for the administration of justice and collection of revenue in Ganjam and Vizagapatam. The Maharajah of Bobbili obtained a mortgage decree against the Zemindar of Pachipenta for a sum of about Rs. 2,75,000 which directed the sale of the mortgaged property in case of default of payment within the time fixed in the decree. The mortgaged property comprises 73 villages in all, 69 of them being situated in the Agency tracts of Vizagapatam subject to the jurisdiction of the Collector and Agent to the Governor and the remaining 4 in the non-agency portion of the Vizagapatam District and subject to the jurisdiction of the District Court. The defendants in the suit having committed default in the payment of the decree amount the decree holder took steps to bring the mortgaged villages to sale. The four villages not comprised in the agency tracts were first brought to sale by the Agent to the Governor. The subject matter of the petition to the Government related to an alleged serious error in the sale certificate granted

by the Agent to the purchaser in the auction sale held by the Court namely the Maharajah of Jeypore. Briefly the complaint was that the certificate stated that the 69 villages together with the hamlets forming a portion of them were brought to sale by the District Court of Vizagapatam and the 69 villages situated in the agency were subsequently included in the sale while in fact the hamlets were not sold but only the 69 main villages excluding the hamlets. The purchaser contended that the hamlets were in reality brought to sale by the Court. The Agent to the Governor dismissed the application for the rectification of the alleged mistake and the only question for our decision is whether as a matter of fact, there is any real mistake in the sale certificate.

Before dealing with the merits we may dispose of a preliminary objection raised by Mr. B. N. Sarma the learned vakil for the respondent. He contends that no petition lay to the Government against the order of the Agent to the Governor because, he says that the Agent's order must be treated as one refusing to review an order passed by his predecessor in the office, Mr. Turning, on 2nd May 1908, that the application for the rectification which he says must be treated as an application for review of that order was put in, long after the three months allowed for review applications that Mr. Parsons who disposed of the application had no jurisdiction at all to review Mr. Turning's order and that no petition would lie to the Government against Mr. Parson's order dismissing the petition for review. It is clear that the whole of this argument proceeds on the application to this case of the rules contained in the Civil Procedure Code which is admittedly inapplicable to the Agency tracts. It is, however, unnecessary to consider whether the particular rules of the Civil Procedure Code having a bearing on the point should be applied to this case or not as it is perfectly clear in our opinion that the applicaton to the Agent to the Governor should not be regarded as one for review of Mr. Turning's order. As a matter of fact Mr. Turning passed no order on 2nd May 1908, deciding what was comprised in the sale held by the Court and what the terms of the sale certificate should be. On that day Mr. Turning dismissed an application of the judgment-debtor's requesting that the sale should be set aside on the ground of certain irregularities. It appears that on the same day the Ministerial Officer of the Court proposed a a sale certificate as the application for setting aside the sale had been dismissed. On the draft certificate we find an office note "for approval." As the certificate was subsequently issued we

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may take it that the agent approved the draft. It is this fact that is relied on as a judicial order determining what were the exact properties sold by the Court and what the contents of the certificate should be. It is absolutely impossible to uphold this contention. It is the duty of a Court when sale has been confirmed to grant a sale certificate to the purchaser. But in merely drawing up a certificate to be given to the purchaser there is no judicial order passed binding on any party. If a question be raised as to what the certificate should contain on account of a dispute between the parties and the question is adjudicated upon by the Court, the order passed by the Court would of course be a judicial order. There was no such order in this case; and the petition to rectify the alleged mistake in the sale certificate cannot therefore be treated as one for the review of any judicial order. The order dismissing the petition for rectification was of course a judicial order. Under Clause 31 of the Agency Rules "all petitions against the proceedings of the Agent must in the first instance be submitted to Government" It has been held by this Court in *Sri Sri Sri Vikarmadeo Maharajapulam Garu* v. *Sree Neeladevi Pathamadha Dhevi Garu*,[1] that a petition would lie to the Government to revise orders of the Government Agent in execution proceedings under Rule 31 although that section does not in terms lay down that a petition would lie against the Agent's orders on the petition. See also *Maharaja of Jeypore* v. *Neeladevi*.[2] We overrule the preliminary objection.

Proceeding now to deal with the merits of the petition we have no hesitation in holding that the Agent intended and purported to sell the whole of each of the 69 villages in question including the hamlets attached to each. It is admitted that the decree for sale did comprise the hamlets. The mortgaged property was practically the whole of the Zeroyiti villages of the Kemandari of Pachipenta as well as the inams belonging to the Zemindar and the forests of the of the Pachipenta Zemindari. 73 villages are enumerated in the decree and the Schedule gives the boundaries " for the whole of the Pachipanta Zemindari." The entire argument for the petitioner is based on the fact that the boundaries given in the application for the execution of the decree for sale do not comprise the hamlets attached to each of the villages and that the latter are excluded from the sale by the boundaries. It is not pretended that the decree-holder intended to bring only a portion of the mortgaged properties to sale. The argument evidently is that, as a fact, the boundaries do not

1. (1902) I. L. R. 26 M. 266. 2. (1900) I. L. R 13 M. L. J. 151.

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include the hamlets and that the auction purchaser is bound by the actual boundaries mentioned in the application which were also inserted in the proclamation. It may at once be stated that the order for sale stated that the villages mentioned in the execution application should be sold. The proclamation of sale copied the boundaries given in the execution application as also did the sale list. It is therefore argued that it must conclusively be taken that nothing more than what was comprised in the boundaries was intended to be sold. No enquiry has been held by the lower court as to whether the contention that the boundaries actually mentioned would exclude the hamlets is well founded or not. If the petitioner's contention that the boundaries given for each of the villages must be regarded as conclusively determining what was sold it would of course be necessary to direct an enquiry to determine whether they comprised the hamlets or not. But in the view we take of the case it is unnecessary to do so. It is admitted that the extent given in the application for execution and in the subsequent proceedings, of the villages to be sold, the income of each of those villages and the Peishcush or Government assessment payable on them all follow the description in the decree which admittedly included the hamlets. The decree holder requested the Court to sell the villages as a single lot. See his petition, dated 16th July 1907. The debtor requested that the villages should be sold separately. There was then no question that each village with its hamlets was to be sold. The decree-holder seems then to have been directed to state the boundaries of each of the villages. There evidently was some difficulty in doing so. The decree-holder put in a petition on the 16th October 1907 justifying the boundaries given by him. He said "the boundaries given to the villages by the judgment debtors and their men as contained in the registered Muchilikas were given and they cannot question their correctness now. Further they did not venture to give correct boundaries even." He at the same time protested against the sale of the villages separately. It is quite clear from the above petition that the decree holder who presumably had no direct knowledge of the boundaries gave the best description he could then relying on the boundaries contained in documents taken by the judgment debtor from his lessees in the course of his management of his estate. It is quite certain that what the decree-holder intended to sell was the villages included in the decree. The whole *Zemindari* consisted of 73 villages, 69 of which were to be sold by the Agent. This fact was well-known to the parties to the suit and there can no doubt that intending purchasers understood that the villages well-known by their names were

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to be sold as a whole. It is admitted that the hamlets are attached to and formed portions of the villages and we entertain no doubt that the hamlets were not excluded from the sale. The Court finally decided that the villages should not be sold separately. But apparently no change was made in the sale proclamation by omitting the boundaries of single villages and giving only a single set of boundaries for the whole Zemindari as was done in the decree. The judgment debtors in their petitions, dated 20th March 1908 and 26th March 1908 fully admitted that the whole of the Zemindari was being sold. The sale commenced on the 20th and was concluded on the 26th March 1908. In their petition of the 26th they state that "the present Zemindari of Pachipenta more fully described in the proclamation of sale, was advertised for sale on the 20th March 1908." In the petition of 20th March 1908 it is said "that the whole of Agency portion of the Pachipenta Estate has been proclaimed to be put to auction on 20th March 1908 in execution of the above decree." There cannot be a shadow of doubt that the judgment debtors fully understood that the hamlets were included in the sale and that their belated application for the rectification of the certificate was merely a desperate attempt to secure some portion of the Zemindari for their family. We may note that in the sale proclamation published in the "Madras Mail" it was distinctly stated that the whole of the Zemindari was to be sold. The petitioners cannot now be permitted to assert that considerable portions of the villages were not brought to sale. We are unable to agree with Mr. K. Srinivasa Aiyangar, the learned vakil for the petitioners that there is any hard and fast rule that the boundaries must be taken to be the sole determining factor in deciding what was intended to be sold. Where there is a conflict between the boundaries and measurements more importance would no doubt be ordinarily attached to the boundaries. But this is only because parties generally pay more attention to the boundaries than to the measurements of property intended to be conveyed. The question in every case is what was the intention in that case. Where the boundaries are indefinite the measurements assume more importance. In this case the important factor in the description is the name of the village. In forest tracts villages are known by well-understood names and both the boundaries and measurements are often vague. The rules applicable for the determination of the identity of the property conveyed have been laid down in *Lord* v. *The Commissioners for the City of Sydney*.[1] The most important authorities on the question are collected in *Durga Prasad Singh* v.

1. (1859) 12 Moore's P. C. 473.

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Rajendra Narain Baghi,[1] by Doss, J. The learned Judge observes that the ordinary canon of interpretation of a deed or grant, when there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity unquestionably is that the description of the boundaries, if it is precise and accurate, dominates the description of the quantity. See *X'Llewellyn* v. *East of Jersey*,[2] *Jack* v. *MIntyre*,[3] *Cowen* v. *Tinfilt Ltd.*,[4] *McInner* v. *Walker*,[5] 4 Wheaton S. 444. On the other hand there is a supplementary canon equally well established, though instances of its application are much less frequent than those of the other, that if the description of the boundaries is vague and uncertain, it yields to the description of the quantity: See *Harid* v. *Siaby*,[6] *Davis* v. *Shepherd*,[7] *Mellor* v. *Wabmisley*,[8] *Home* v. *Stunber*,[9] etc.

These two canons are in fact illustrations of, and may be summed up in a more general principle that where there are two conflicting descriptions of the subject matter of a grant, or two conflicting parts of the same description that which is the more certain and stable and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter. This, again, is not a rule of law and hence infallible in its character, but a mere rule of construction, which serves as a safe and almost infallible guide in determining the intention of the parties, which is the touchstone of all true interpretation. Indeed, it is all controlling and predominates over all the elements of description of the subject matter." In the case before the learned Judge both the boundaries and the quantity were precise and definite but there was a gross divergence between the quantity specified and the quantity found to be included within the definite boundaries. It was held that the intention in the particular case was to convey the quantity mentioned, within the boundaries. See also *Kumar Rameshar Malia* y. *Ram Tarak Hazar*.[10]

We have no doubt that everybody in this case understood that the predominant factor of the description was the name of the village. As already stated the extent, the Government assessment, the income, all referred to the whole village as mentioned in the decree. The division of the whole Zemindari according to taluks and the villages included in each taluk as described in the decree was also

1. (1909) 37 Cal. 293.
2. (1843) 11 M. and W. 183.
3. (1845) 12 Cl. and Fin. 151.
4. (1898) 2 Ch. 551.
5. (1889) 2 Ch. 309.
6. (1867) L. R. 1 P. C. 436.
7. (1886) L. R. 1 Ch. App. 410.
8. (1905) 2 Ch. 164.
9. (1902) A. C. 454.
10. (1909) 14 C. W. N. 268.

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followed. It is also admitted that in the description the forest income of the whole Zemindari was taken into account. It was argued that whatever might have been the intention the description in the sale certificate must not contain any words not to be found in the sale proclamation and that the question what was contained in the latter should be left over and should not be taken into account in determining the contents of the sale certificate. This was apparently the view taken by the District Judge of Vizagapatam who allowed the sale certificate to be rectified with regard to the 4 villages under the jurisdiction of his Court. We are unable to uphold this contention and we are unwilling, in a case where there can be no possible doubt of what was intended to be sold to leave open a matter which is sure to be made an occasion for future disputes. We, therefore, confirm the order of the Agent and dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair, and Mr. Justice Ayling.

Authi Lakshmi and others ... ... *Appellants.*

v.

Annasami Aiyar and others ... ... *Respondents.*

Authi Lakshmi v. Annasami Aiyar.

Compromise and Family Settlement—Validity of—Consideration for Courts.

In judging of the validity of a compromise, Courts are not entitled to enquire into the rights of parties as they stood before the compromise to see whether the compromise has recognised them; they are only entitled to enquire whether the claims advanced by either side were *bona fide* and whether the compromise really was in settlement of such claims. Every compromise may involve the giving up of certain claims to which a party may be rightly entitled and the acquisition of interests to which he may have no claim. If the compromise is a settlement of disputes advanced *bona fide*, then, *prima facie* it ought to be upheld; and this reason applies with greater force in the case of family settlements where the peace of the family was involved.

Second Appeals from the decrees of the Court of the Subordinate Judge of Kumbakonam in A. S. Nos. 151, 176, 195 and 150 of 1908, respectively, presented against the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 391 of 1906.

T.V. Seshaghiri Aiyar and *N. Rajagopalachari* for appellants.

K. Srinivasa Aiyangar and *N. R. K. Thathachari* for respondents.

The Court delivered the following

S. A. Nos. 1645, 1072, 1141 And 1659 of 1906. In S. A. No. 1645 of 1908.
2nd May 1912.

Authi Lakshmi v. Annasami Aiyar.

Judgments. *S. A. No.* 1645 *of* 1908:—The plaintiff is the son of Devaraja Aiyar, who died in the year 1850, leaving a widow named Ponnammal. He had another son Sivarama Aiyar who predeceased him in 1843. Sivarama Aiyar had a son, Devaraja Aiyar by name, who died in 1851. The plaintiff now claims to recover the property as the reversioner of this Devaraja Aiyar as his brother's son, alleging that the cause of action arose on the death of Devaraja Aiyar's mother, Mangalathammall, who obtained possession of the property on Devaraja Aiyar's death and died in the year 1905. The defendants are the persons who claim under various alienations made by Mangalathammal. One of the questions raised for decision is whether Mangalathammal had become the absolute owner of the properties which are in the possession of of these defendants, under a compromise. Exhibit VIII, or whether she had only a widow's interest in the estate.

Some years before plaintiff's father, Devaraja Aiyar's death, there was a partition entered into between him, his son, the plaintiff, and his daughter-in-law, Mangalathammal, acting as the guardian of her minor son, Devaraja Aiyar. Each of them took a ⅓rd share in the family property. The partition-deed also recites that on the death of the plaintiff's father, Devaraja Aiyar, his property was to be divided equally between the plaintiff and his brother's son, Devaraja. Six years afterwards, in 1859, a fresh arrangement was come to, by which the arrangement of 1844 was modified. Devaraja Aiyar died in 1850. Disputes arose between the parties immediately after and a suit (O. S. 726 of 1851) was filed by Ponnammal (widow of Devaraja Aiyar) in the Diwani Adawlut Court of Kumbakonam against her daughter-in-law, Mangalathammal and certain others. She set out the partition of 1844 as well as the partition of 1850, and stated that when she came to know of this arrangement of 1850, she represented that the arrangement was unfair, as it did not provide for the performance of various ceremonies of her son, and she alleged in the plaint that when her husband was about to die he acknowledged in presence of mediators that the deed of partition executed by him was inequitable and that the properties should, upon her son's attaining the age of majority, be divided into two equal shares. She alleged that these defendants had taken illegal possession of these properties, that the deed of partition was void, that her daughter-in-law was entitled only to maintenance and not entitled to any property and that she was entitled to recover possession of those properties which she was not in possession of. What Mangalathammal's contention in that suit was does not

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appear. All the evidence that is relied on by the plaintiff to prove what her contention was, is Exhibit XXIII, which is a statement filed by Ponnammal in that suit itself in reply to the written statement of Mangalathammal. That statement does not show what Mangalathammal's contentions were. In the course of that suit, a razinamah, Exhibit VIII, was put in by the parties. It refers to the death of Devaraja Aiyar after the partition of the 18th July 1850, and it states that Mangalathammal "1st defendant herself, shall with rights of every kind and with competency to alienate by way of gift, sale or otherwise enjoy the properties that fell to the share of the said Devarajan under the said deed of partition and list," and it gives similar rights to the plaintiff therein on behalf of Annasami Aiyar. By that document Mangalathammal also undertook to pay to the plaintiff therein through court Rs. 115 for meeting the marriage expenses of her son, Annasami. The main question in the suit is whether this compromise (Exhibit VIII) gives the properties referred to therein to Mangalathammal absolutely. On behalf of the defendants it is contended that it was a family arrangement between the members of a Hindu family and that it settled the disputes which had been raised between the parties and it should not now be re-opened at this distance of time. On behalf of the plaintiff it is contended that the compromise gives Mangalathammal no more than what was given to her by the deed of the 18th July 1850 in the properties, that she took only a life interest in them, *i. e.*, the interest of a Hindu widow, and that for her acquisition of the absolute interest in the properties there was really no consideration. But as we have already pointed out, it does not appear what Mangalathammal's contentions were in that case. Nor does it appear whether the properties of which she obtained possesssion were one-half of the properties left by Devaraja Aiyar, the plaintiff's father. It also appears that she paid Rs. 115, which she was not bound to pay, for meeting the expenses of the plaintiff's marriage. If in that suit she claimed one-half of the properties in dispute and she claimed not only a widow's interest in such properties but an absolute interest with right to alienate by way of gift or sale or in any other form, then it is difficult to say that the compromise was not in settlement of claims advanced in that suit. In that view she must have given up a portion of the properties to which she laid claim and paid a sum of Rs. 115. in consideration of Ponnammal recognising her absolute interest in the properties which were finally given to her. It is true that there is no direct evidence in the case of what the scope of the litigation was or what her contentions were ; but the deed

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of compromise itself, by recognising in her such rights, is evidence that she claimed those rights. The plaintiff's pleader contends that the deeds of partition of 1844 and 1850 did not recognise such a claim and that she did not put forward any claim which was not recognised by those partition-deeds. But in judging of the validity of a compromise we are not entitled to enquire into the right of parties as they stood before the compromise to see whether the compromise has recognised them; we are only entitled to enquire whether the claims advanced by either side were *bona fide* and whether the compromise really was in settlement of such claims. Every compromise may involve the giving up of certain claims to which a party may be rightly entitled and the acquisition of interests to which he may have no claim. But if such compromise is a settlement of disputes advanced *bona fide*, then, *prima facie*, it ought to be upheld. And this reason applies with greater force in cases of family settlement where the peace of the family is involved. Further, taking into consideration that more than 50 years have elapsed after the date of the compromise and Mangalathammal is now dead, we shall not be justified in presuming that the contentions advanced by Mangalathammal did not involve claims justifying such a razinamah. We are therefore unable to say that the compromise is invalid for that reason.

It is then argued that though the compromise may be valid, Ponnammal had no authority to part with Annasamy's rights as his guardian. If Annasamy himself could have entered into a razinamah like this, we fail to see why Ponnammal acting as his guardian, could not have entered into it. It is possible that Ponnammal might have got on his behalf more property than he would have been entitled to get. She certainly got Rs. 115 of which presumably he had the benefit. She has not parted with Annasami's right of inheritance to Devaraja Aiyar, as was contended for by the respondent's pleader. We disallow this contention. We hold accordingly that the Razinamah (Exhibit VIII)is binding on the plaintiff and that therefore he is precluded from contending that the deceased Mangalathammal was not the full owner of the properties therein referred to with power to alienate. She acquired such power under that compromise. The alienation made by her cannot therefore be impeached by the plaintiff on the grounds alleged.

The decree is reversed and the suit is dismissed with costs throughout, against the appellants, (defendants) Nos. 7 to 10.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson, and Mr. Justice Sundara Aiyar.*

Krishnama Naiken ... *Appellant.*† { *(2nd Defendant, 2nd Respondent).*

v.

Kandasami Gounden, and others. *Respondents.* { *(Plaintiffs, Petitioners).*

C. P. C. XIV. of 1882. S. 315—"*therein*"—*Single lot—no saleable interest in some items of one lot no ground.*

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The Court cannot for the purposes of S. 313, C. P. C. (XIV of 1882) sever a single sale and a sale; cannot be set aside on the ground that the judgment-debtor has no saleable interest in some of several items which formed the suject matter of a sale in a single lot.

Appeal from the decree of the District Court of Coimbatore in A. S. No. 114 of 1908, against the order of the Court of the District Munsif of Coimbatore, in E. P. No. 104 of 1908 in O. S. No. 495 of 1903.

T. Subramania Aiyar for appellant.

C. S. Venkatacharjar for respondents.

The Court delivered the following

Judgment:—The lower appellate court has not found the facts necessary to entitle the decree-holder to re-open the execution proceedings. Section 315 of the Code of Civil Procedure requires that it should be found that the judgment debtor had no saleable interest in the property sold at the time of the sale. There is no such finding recorded by the lower appellate court. The judgment debtor did not admit that he had no saleable interest in Survey Nos. 443 and 460. He asserted the contrary in his memorandum of appeal to the lower appellate court. We must therefore ask the lower appellate court to submit a finding on the question whether the judgment-debtor had a saleable interest in Survey Nos. 443 and 460 on the date of the auction sale. Fresh evidence relating to this question may be admitted. The finding should be submitted within two months after the

* A. A. A. O. No. 42 of 1910. † 18th April 1912.

Krishnama Naiken v. Kandasami Gounden.

re-opening of the Court after the recess. Seven days will be allowed for filing objection.

In compliance with the order contained in the above judgment the District Judge of Coimbatore submitted the following finding.

" My finding on the issue remanded is with regard to Survey No. 460 in the affirmative and with regard to Survey No. 443 in the negative."

The Court delivered the following

Judgment:—It is unnecessary to consider whether on the result of the present finding of the District Court the judgment-debtor could be held to have had any interest in Survey No. 460 at the time of the sale. The defendant's right in three Survey Nos. 443, 476, and 460 was sold for a single price in one lot. It is admitted that he had a saleable interest in Survey No. 476. The decree-holder has not therefore proved that the judgment-debtor had no saleable interest in the property sold. See *Sonarum Dass* v. *Mohiram Dass*[1]. The Court cannot for the purposes of Section 313 of the Code of Civil Procedure sever a single sale. The orders of the lower courts are reversed and Execution Petition No. 104 of 1908 on the file of the District Munsiff's Court dismissed but without costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.*

The Secretary of State for India in Council represented by the Collector of Ganjam.	*Appellant.*	*(Defendant).*†
v.		
Kannepalli Venkataratnammah and others.	*Respondents.*	*(Plaintiff and party Respondent).*

Grant—Construction—"Poramboke"—Channels whether included in grant.

The effect of the insertion of the words "Besides Poramboke" in a grant must depend on the evidence available in each case and the circumstances attending the grant.

1. (1900) I. L. R. 28 C. 235

* Appeal No. 15 of 1907. † 25th April 1912.

Secretary of State v. Kannepalli Venkataratnammah.

Held also that by the particular grant before their Lordships all kinds of poramboke were intended to be included in the grant including channels etc.

Appeal from the decree of the District Court of Ganjam, dated tha 20th day of August 1906 in Original Suit No. 47 of 1905.

The Advocate General for appellant.

P. Narayanamurthi for respondent.

This Appeal and the memorandum of objection put in by the 1st respondent coming on for hearing the Court made the following

ORDER †:—

To enable us to decide this Appeal satisfactorily, we consider it desirable to allow the parties to adduce further evidence on the following point :—(1) What, if anything, passed to the grantee under Exhibit XX under the words 'besides poramboke' and whether she obtained a right to the channels conveying water to the tanks irrigating the lands of the Lakkamdiddi village or to those tanks themselves.

The Lower Court has not dealt with this point in its judgment, but appears to have assumed that the Government did not reserve the channels and tanks at the time of the Inam Settlement.

We request the District Judge to take the additional evidence that the parties may adduce and to submit the same together with his opinion on the effect of such evidence within one month after the reopening of the Disrtict Court after the recess.

[In pursuance of the above order, the District Judge of Ganjam, submitted the following finding :—

" My opinion is that by the words ' Besides Poramboke' the Government acknowledged the title of the Inamdars of the whole Inam village to the channel beds and tanks in dispute." :—Ed.]

After the return of the above finding of the lower Court, the Court delivered the following

Judgment :—The District Judge (Mr. Sadasiva Aiyar) has submitted the fresh evidene adduced both by the plaintiff and the Government and has expressed his opinion that by the words 'besides poramboke' in the inam title deed, Exhibt XX, given to the inamdar—proprietor of the village—the Government acknowledged the title of the inamdar to the channel beds and tanks in dispute. The claim of the Government to water-cess cannot be maintained unless the water irrigating the village flows directly or indirectly from any river, stream, channel, tank or work belonging to or constructed

† 13th February 1911.

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by Government. According to the former District Judge's finding the garebula gedda which irrigates the lands in the village takes its rise in the Parlakimedi Zemindari and does not pass through any Government lands before it irrigates the plaint village; and the Government has not exercised any control over the gedda. But it was contended at the former hearing of the appeal that, although there is no evidence that the channel or stream and the tanks irrigating the village belong to Government it must be presumed that the ownership thereof is vested in it by virtue of Section 2 of Act III of 1905 (Madras Land Encroachments Act) which enacts (we quote only the necessary portion of the Section) that"..............................the bed of the sea and all harbours and creaks below high water mark and of rivers, streams, lakes and tanks and all canals and watercourses and all standing and flowing water and all lands wherever situated, save in so far as the same are the property (*a*) of any Zemindar, Poligar, Mittadar, Jaghirdar, Shrotriemdar, or Inamdar or any person claiming through or holding under any of them....................are hereby declared to be the property of Government, except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other land-owners and all customary rights legally subsisting." It was contended for the plaintiff, the Inamdar, that the section does not really alter the law as previously understood and that the channels passing through the whole Inam village cannot be presumed to be the property of the Government. We considered it desirable to call for a finding on the question whether by the grant of the Inam to the Inamdar the title to the channel irrigating the village belonged to the Inamdar.

The original inam title-deed which was granted by the Government in 1867 has not been produced. It is stated to have been destroyed. A fresh title-deed which was granted in 1898 has been produced and is marked as Exhibit XX. An extract from the Inam register, Exhibit XVI, has also been produced. It appears from it that the Inam was originally granted in 1767 to one Kannepalli Ramavadhanulu as personal hereditary inam by Sitaramraz. Sitaramraz was the brother of Viziaramraz, the then Zamindar of Vizianagaram. He was a renter under the East India Company which had obtained a Firman from the Moghul Emperor granting the management of the Circars to the Company. The village in question was included in the Chicacole Haveli in 1802. The Government sold its Haveli lands in 1803-04 to the highest bidders on permanent settlement; and 20 proprietary estates were formed by

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the sale of the Chicacole Haveli. The village in question is situated in one of the Zamindary so formed, named Jargengi. The Inam village was excluded from the permanent settlement of the Jargengi Estate. The proprietor of the estate was entitled only to get the Kattubadi fixed on the village, the right of resumption of the Inam being reserved by the Government. The Government subsequently recognised the Inam granted by Sitaramraz and settled the Inam with the Inamdars and granted a patta to them. The Inam register Exhibit XVI does not show that the Government intended to exclude any portion of the Inam which had been originally granted in 1767. Exhibit XVI shows the mode in which the quit-rent payable for the village was fixed: the porambokes consisting of channels, tanks village sites, pattis, burial grounds, hills as well as jungle and pasture lands together amounting to 116 acres was excluded from the total acreage of the village. The assessment was fixed on the cultivated dry and wet land. Exhibit XX, the Inam patta of 1898, shows that the Government acknowledged the title of the Inamdars to the whole village. It states "I acknowledge your title to a personal Inam consisting of the right to the Government revenue of land claimed to be 108·38 acres of dry, 218-53 of wet and 13 acres of garden and situated in the Jargengi proprietary Shrotriem portion of the village of Lakkimdiddi of Chicacole, District of Ganjam." The words "Besides Poramboke" are inserted in the margin, the extent of this Poramboke being as appears from Exhibit XVI, 116 acres. The District Judge assumes that the original title-deed must have also acknowledged the Inamdar's title to the Shrotriem village said to consist of a certain extent of dry and wet land besides poramboke. This assumption is based on the form of grant issued in respect of whole village Inams as appearing from the title-deeds granted by the Government for other villages produced on behalf of the plaintiff. It is unnecessary to consider whether this assumption was safely made. It is contended on behalf of the Government that the object of the Inam title-deed was only to recognise the Inamdar's title to the Government revenue or melvaram of the village and in cases where the Inam was enfranchised to give up the Government's right of resumption; that as no melvaram was levied or payable on Porambokes there could have been no intention to recognise the Inamdar's title to any Poramboke by the grant of the title-deed. We do not decide in this case that the mere insertion in the margin of the title-deed of the words "Besides Poramboke" must necessarily be taken to be an acknowledgment by the Government of the Inamdar's title to all kinds of Poramboke. It was held in S. A. No. 1445 of 1910 by this Court that such is not the necessary effect of

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the insertion of those words. The question in that case related to the bed of a stream. The Inam there was granted by the British Government in 1802 in lieu of certain lands held as emoluments of the office of Nattuvar which had been resumed by the Government. No boundaries were stated in the documents relating to the grants and no mention was made of the river or river-bed. The Court held that notwithstanding the insertion of the words "Besides Poramboke" in the margin of the title-deed the documents in the case showed that it was not intended to acknowledge the Inamdar's title to the bed of the stream. In *Ambalavana Pandara Sannathi* v. *Secretary of State for India*,[1] it was held that a grant of a village "with all wells, tanks and waters" within the boundaries did not pass to the grantee an artificial water-course then existing which irrigated the village granted and other lands. There was no mention in the grant of the channel although the existence and importance of channels as separate entities were present to the mind of the grantor and although tanks and wells were separately mentioned. It was held that the omission of channel was intentional and that from that circumstance it was clear that it could not have been the intention of Government to recognise the Inamdar's title to the channel or its bed. The effect to be given to the insertion of the words "Besides Poramboke" must depend on the evidence available in each case and the ciscumstances attending the grant. In this case it is extremely unlikely that when the whole of the village was granted in 1767 by Sitaramraz it was not intended to convey to the grantee all the waste and Porambokes in the village. The British Government accepted that grant and recognised the Inamdar's title under it. The channel was not one which passed through any Government property before it reached the village of Lakkimdiddi. It is apparently not a large stream connected with any system of irrigation maintained by Government and as found by the former District Judge the channel was not controlled by the Government to any appreciable extent. There was no intention on the part of Government at any time to derogate from the grant made in 1767. Both the learned District Judges who dealt with the case proceeded on the footing that the channel and other Poramboke in the village belonged to the Inamdar. On the whole we see no reason to dissent from that conclusion. It has therefore not been proved that the water irrigating the village belongs to Government. In the result, we dismiss the appeal with costs. The memorandum of objections has not been argued and is also dismissed with costs.

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1. (1905) I. L. R. 28 M. 539.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

In re a Vakil.

Professional misconduct—Vakil's duty to the Court and the client—Negligent management of office.

In re a Vakil.

Under Rule 95 of the Appellate Side Rules of the Madras High Court, pleaders are responsible to the Registrar for all translation and printing charges incurred by him on their behalf under those rules. To that extent a Vakil must co-operate in the conduct of the suit with the Registrar and with the Court under those regulations.

Vakils have the other general functions applicable not only to the Bar in general, but to solicitors at large, that they must in the conduct of all suits entrusted to them, co-operate with the Court in the orderly and pure administration of justice.

Where a Vakil was negligent in the management of the appeal entrusted to him and of his client's affairs which caused the procedure of the Court to be the very opposite, of what such procedure should be, *viz.*, first, responsible. secondly orderly. and thirdly pure, *i.e.*, in not seeing that the clients' money that was duly received by him was paid by his clerks into the Court in proper time for the printing of the records, and that they properly represented matters relating to the case to the client, *held* affirming the decision of the High Court[1] that there was reasonable cause for the suspension of the Vakil for a period of six months under Section 10 of the Letters Patent even though the Vakil himself be acquitted of direct and personal fraud in the case.

Kenworthy Brown for appellant.

The judgment of their Lordships was delivered by

Lord Shaw :—This is an appeal against an order of the High Court of Judicature at Madras. The order is dated the 28th February 1912. Under that order, the appellant who was a Vakil of the Court was suspended from practice for six months on the ground of professional misconduct.

The circumstances of the case have been resumed in a very careful judgment by the learned Judges of the Court below. Their Lordships only review them further for the purpose of illustrating the one point which appears to them to be conclusive of the present Appeal.

In the year 1907 the present appellant, the Vakil was employed to file a Second Appeal in the High Court against a decree of the District Court of South Arcot. The condition of matters with regard to a Vakil, and his relation to the procedure of the Court, which bears upon this case, are set out in S. 95 of the Appellate

1. (1912) 22 M. L. J. 276.

20th June 1912.

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Side Rules of Madras. By that section pleaders " are responsible to the Registrar for all translation and printing charges incurred by him on their behalf" under these rules. To that extent the Vakil must co-operate in the conduct of the suit with the Registrar, and with the Court, under these regulations. And they have the other general function, applicable not only to the Bar in general, but to solicitors at large, that they must, in the conduct of all suits entrusted to them, co-operate with the Court in the orderly and pure administration of Justice.

In the present case a certain advance was made, or required to be made, in order to enable printing to be done as court printing. A correspondence accordingly ensued between the Vakil, and his client; and it is a well founded observation made in the anxious argument presented to their Lordships from the Bar that that correspondence was mainly conducted by a manager and a clerk of the Vakil, and not by the Vakil personally. That, however, is not completely the true case; One of these letters, an important one, of the 8th September 1908, was written by the Vakil himself. Further, the Vakil in the present case, the present appellant, was, of course, charged with the knowledge that it was necessary, not only that the moneys should be received from his clients, but that in common honesty that money should be paid to the Registrar for the discharge of the printing dues. This was not done. Statement after statement is made by the manager and clerk in the course of this correspondence containing a false narrative of what had been proceeding, and constituting a fraudulent deception of the client.

Matters, however, culminated in a visit paid by the client on the 5th March 1909, when a payment of Rs. 28 making up the full amount to which the printing charges had accumulated at that day, was made by the client to one of the clerks in the Vakil's office. The full sum amounted to Rs. 68, that is to say, a payment of Rs. 28 on the spot, added to a previous payment of Rs. 40.

That being done, what followed? The client naturally expected that his case would be proceeded with. He was falsely informed on the 15th July, by a letter written by the clerk, that certain progress was being made. Nothing, however, had been done, on account of the initial withholding from the Registrar of the Court of the whole of the money received from the client.

On 25th of January matters were in this position: that this case was listed for the following day, the 26th, and, as is admitted in a most fatal document for appellant in this case, namely, his own affidavit, the appellant then personally knew of the transactions in

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the interim. His knowledge must have included the knowledge that the money is received for a specific purpose from the client had not been so applied. When the Vakil arrived at the Court on the morning of the 26th January 1910 he was aware that he was accordingly bound, as a responsible Vakil, in honour and in duty to his client, to himself, and to the Court, to explain that the cause, which would in the natural course be dismissed for want of payment of the printing dues, was exposed to this peril by reason of a circumstance for which he ought to have appologized publicly to the Court and expressed his regret. His affidavit, however, is to this effect: "when I reached the doors of this Court it was about a few minutes after this case had been called on and dismissed for default." In short, he makes to the court below, and at this Bar, an excuse that, being engaged elsewhere, he did not appear to discharge that duty of honour which on all sides plainly rested upon him. Having made that mistake a further course was open to him and that was to wait until an interval in any procedure of that court, or till the court was about to adjourn, and instantly to make his honourable explanation. He did not do so. He allowed matters to drift for about 18 days, as after mentioned; and the court below having considered the excuses put forward for not sooner making application to rectify what had occurred think these excuses to be idle.

He apparently returned to his office and what did he then do with his staff? His staff by that time had been convicted of most fraudulent and improper conduct in keeping the client's money in sending lying letters to a client and in giving, in the interval an untrue account to the proceedings in the appeal. This Vakil, who has been acquitted of personal fraud by the court below an acquittance with which their Lordships do not in any degree interfere was guilty of the regrettable conduct of permitting a staff, who had previously been guilty of such deception, to continue in correspondence with his client. It was for him to say whether he should retain such persons in his service, but at all events he was honourably bound to disclose to his client the mishap that had occurred on the morning of the 26th January. Instead of that the staff was continued as before, and on the 28th January the client was written to by Bashyam in these terms. "Your second appeal aforesaid came on for hearing on the 26th instant, and was decided against us, that is the appeal was dismissed." That implies two falsehoods. This case did not come on for hearing. It was never heard. It was not decided against them in the sense of a decision having been pronounced *in foro contentioso*. It was dismissed simply in consequence of the improper non-payment of moneys due. Accordingly so far as the

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client was concerned nothing was done to wipe out the mistake which had been made by the Vakil. So far as the court was concerned nothing was done for about a period of 18 days.

In the interval the client had appeared in Madras, and, no doubt, made his determination plain to have the matter brought before the Court as one at least of mischance. Accordingly an application had to be made, and it was not made until the 14th of the following month of February—an application for the restoration of the case to the Roll. Then, the Court apprehending the gravity of the situation instituted this inquiry. Every conceivable point has been taken against the regularity of that inquiry in the Court below; but at the Bar, when the case was anxiously and ably argued, these points have not been insisted upon. For they were without substance.

The main issue in this case is, what was the conduct, relative to the Court, relative to the client, and relative to his own professional position, which this vakil perpetrated on or about the 26th January? Their Lordships while not interfering, as stated, with his acquittance of direct and personal fraud do not see their way to acquit him of conduct in the management of the appeal and of his client's affairs which caused the procedure of the Court to be the very opposite of what all such procedure should be, namely, first responsible, secondly orderly and thirdly pure. In all these respects, there has been a violation of the proprieties which attach to legal procedure.

That being so the Court made this inquiry. Its powers seem to be those contained in S. 13 of the Letters Patent creating the Court and containing, *ingremio* thereof, the rules with regard to Advocates, Vakils, and Attorneys-at-Law. Amongst these Rules is rule 10, which empowers the court in these terms "to remove or to suspend from practice on reasonable cause the said Advocates, Vakils or Attorneys-at-Law."

The sole question which their Lordships have to consider in the present case is: the Court being apprised of the procedure which has been briefly described can it be said to have acted without reasonable cause in making an interim suspension of the appellant from practice as a vakil for a period of six months? Their Lordships think that there was reasonable cause in the present case, and they further think that the Court below was justified both in the pronouncement and the extent of the suspension.

With regard to the appeal very properly made by Mr. Kenworthy Brown as to his client, their Lordships can only express the

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hope that in the management by those under him of affairs committed to his charge, he will, in future, see to it, that such improprieties as those referred to do not revive: and, if that is done, there seems no reason to doubt that after this discipline, he will be able to resume an honourable professional career.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Justice Abdur Rahim and Justice Sadasiva Aiyar.

Appu Pillay and others ... *Appellants* (*Plaintiffs.*)

v.

Perumal Pillay ... ... *Respondent* (*Defendant.*)

Specific Relief Act S. 42—Declaration—Consequential relief—Plaintiff entitled to joint management—Possession, prayer for.

Appu Pillay *v.* Perumal Pillay.

A plaintiff who is out of possession of charity properties cannot merely confine his suit to a declaratory decree but should ask for possession, even though it be that according to him he is entitled to the right of management in alternate years only and that the Court may not be able to place him in possession on the date of the hearing by reason of the fact that it takes place in the period in which the opposite party was admittedly rightly in possession *Ratnasabapathi* v. *Ramasami*[1] and *Ram Das* v. *Hanumantha Rao*[2] followed.

Second appeal from the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 46 of 1910 presented against the decree of the Court of the District Munsif of Srirangam in O. S. No. 57 of 1909.

T. Narasimha Aiyangar for appellants.

N. Rajagopalachariar for respondent.

The Court delivered the following

Judgment:—The appellants were the plaintiffs in the suit instituted by them asking for a declaration that they were entitled to the right of management of certain charities and the endowed properties on alternate years, and they further asked that they might be given possession of the properties during their periods of management, and that an injunction might be issued restraining the defendant from entering upon the plaintiffs' properties during the plaintiffs' terms of management. The suit was dismissed by both the lower courts. The plaintiffs had paid court fees in the court of first instance as well as in the lower Appellate Court on the basis of a suit for possession but in the Second Appeal they

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S. A. No. 251 of 1911. * 3rd May 1912.

1 (1910) I. L. R. 33 M. 425. 2. (1910) 21 M. L. J. 952.

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paid only a court fee of Rs. 10 and on objection being taken by the office the pleader for the appellants stated that he would confine the appeal to the relief for a declaration of their rights. Objection is now taken before us that the plaintiffs being out of possession of the temple and its properties a suit for declaration alone cannot be maintained. We think this objection must prevail on the principle laid down in *Rathnasabapathi Pillai* v. *Ramasami Aiyar*,[1] and *Ram Das* v. *Hanumantha Rao*.[2]

The learned pleader for the appellants contends however that his clients are entitled to management only in the alternate years and that as they would not be entitled to-day to be placed in possession of the properties, we could not give them such a relief and all that they would be entitled to is a mere declaration of their rights. We do not think he is right in this contention in support of which he has not adduced any authority. The learned pleader then urges that having regard to the view we have taken of the law on this point he might be allowed to pay full court fees now, treating the appeal as if it was against the execution decree. But ha has advisedly limited the scope of his appeal to the first relief asked for in the plaint *viz.*, a declaration of his rights and we do not think we can allow him at this stage to enlarge the scope of his appeal. The second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Meenakshi Sundara Nachiar ... ... *Appellant.* (*Defendant.*)

v.

Sa. Rm. Ct. Chidambaram Chetty and others ... *Respondents.* (*Plaintiffs.*)

Meenakshi Sundara Nachiar. *v.* Chidambaram Chetty.

Landlord and tenant—Rent Suit—Plea of partial eviction—English and Indian Law—T. P. A., S. 108, Cl. (c)—Construction.

Sec. 108 cl. (c) of the Transfer of Property Act does not make actual prior payment of rent a condition for the right to enjoy the holding without interruption.

Both under the English and Indian Law non-delivery of possession of the premises is a good answer to a suit for rent. Actual or constructive eviction of the tenant from the entire holding is a good plea in answer to a suit for rent by the landlord ; but partial eviction (*i. e.* eviction from part of the holding) is no answer to a suit for rent to the extent or the portion in the enjoyment of the tenant. The tenant may on partial eviction repudiate the whole lease, but if he does not and remains in possession of a portion, he is estopped from pleading

1. (1910) I. L. R. 33 M. 452.
2. (1911) 21 M. L. J. 952.

S. A. No. 1009 of 1909. 15th April 1912.

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non-liability for the rent of the portion in his occupation. He will be liable to pay rent but entitled to damages in respect of the eviction and he can set off the damages as against the rent in the landlord's action for rent.

If clause (c) of S. 108 T. P. A. is to be read as importing a condition at all of prior payment of rent, it can only be so read in cases where the lessee claims actually to entire his right to damages for breach of the covenant for quiet enjoyment.

Second Appeal from the decree of the District Court of Madura in A. S. No. 524 of 1908, presented against the decree of the Court of the Subordinate Judge of Madura (East) in O. S. No. 27 of 1908.

N. T. Shamanna for appellant:—The Lower Court having found that the tenant was evicted though partially, the landlord is not entitled to recover rent of the entire holding so long as the eviction continues, *Chandrakanth Das* v. *Ramnath Burman,*[1] *Rajheswari* v. *Surendra Mohan,*[2] *Rai Charan Sha* v. *Administrator-General of Bengal,*[3] and T. P. A., S. 108.

C. V. Ananthakrishnier for respondent:—There is no reason why the entire rent should be suspended, because of a small eviction. The eviction must be substantial before the tenant might abandon the holding on that ground. In the absence of an abandonment of the holding the tenant ought not to be permitted to plead eviction as a defence. At best the damages might be assessed and deducted from the rent claimed for. Apportionment has been allowed in *Dhunput Singh* v. *Mahomed*[4] S. A. 543 of 1909 and by the Privy Council in *Imambandi Begum* v. *Komaleswari.*[5] The rule is not a universal one; *Ananda Prasad* v. *Mathew,*[6] See also *Gopal Naicker* v. *Suppa Pillai*[7]. The English rule is that rent cannot be sued for so long as eviction continues, not that rent for that period cannot be sued for when the eviction ceases. See Halsbury, Vol. 18, p. 479. There is no reason why the English rule should be imported into India without regard to the circumstances and when the Transfer of Property Act does not require it.

T. Rangachari:—Clause (c) of S. 108, Transfer of Property Act is merely a reproduction of what is generally found in English leases; see page 404 of Shephard's Transfer of Property Act. The legislature intended the covenants to be independent. The leaning of the courts is against construing anything as a condition. This clause is relied on against me by the lower court saying that the landlord can interrupt my possession if I do not pay

1. (1910) 11 C LJ. 591.
2. (1909) 11 C. L. J. 602.
3. (1909) I. L. R. 36 C. 856.
4. (1896) I. L. R. 24. C. 296.
5. (1894) I. L. R. 21 C. 1005
6. (1909) 9 C. L. J. 585.
7. (1908) 19 M. L. J. 58

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the rent. This clause does not say that if rent is not paid, the tenant can be disturbed. I am not relying on this clause. There must be an express covenant authorizing the landlord to re-enter on non-payment of rent. See. S. 111, Cl. (*g*) and S. 114. My right of action is one for damages [S. *Aiyar*, J. Then is not the court entitled to say that a plaintiff who wants damages must have performed his part of the contract ?] Not where the landlord has by his own wrong ousted the tenant. There is no clause in the Transfer of Property Act dealing with tenant's right to suspension of rent. This right is under the general law. I refer to *Raicharan Shar* v. *The Administrator-General of Bengal*[1], *Edge* v. *Boileau*[2], *Dawson* v. *Dyer*[3] *Bartin* v. *Bidwell*[4]; payment of rent has never been held to be conditional Leake on Contracts 5th Edn. p. 561. Foa's Landlord and Tenant pp. 166-167; mere idle threat to oust would of course be useless, *Sanderson* v. *Mayor of Berwick*.[5] There is a distinction between suing for damages and answering to a suit for rent; for the right to suspension of rent, see *Mahomed Jenalby* v. *Sakenissa*.[6]

C. V. Anantakrishna Aiyar:—Rent for Fasli 1314 was in arrear for Rs. 250. Rent for Fasli 1315 having been in arrear proceedings under the Rent Recovery Act were taken and it was by mere accident that the landlord became the purchaser. His further act must be deemed to have been done by him as purchaser and not as landlord, just as if a stranger had become the purchaser. [S. *Aiyar*, J. How can you split up the capacities as if they were different legal persons ?] The acts do not amount to eviction if there is no substantial displacement of the tenant. In the next place, the landlord in this case was not a trespasser but a purchaser in court-auction making a *bona fide* attempt to take possession. *T. Ranee Surnomoyee* v. *Soshee Nokshee Burmonia*[7]. Again, the order of attachment being upon consent the defendant is not entitled to rely upon any damages consequent upon attachment. *Raicharan Shar* v. *The Administrator-General of Bengal*[1]. Lastly, the attachment being the result of a judicial act plaintiff is not liable for the same. Fawcett, p. 209. Lastly, the Transfer of Property Act does not give the right to have a suspension of the rent. The cases have not considered the provision of this Act because apparently they were not

1. (1909) I. L. R. 36 C. 856.
2. (1885) 16 Q. B. D. 117.
3. (1833) 110 E. R. 906
4. (1881) 18 Ch. D. 238.
5. 13 Q. B. D. 547, 551.
6. (1910) 14 C. W.N. 446, 449.
7. (1868) 12 M. I. A. 244.

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leases governed by the Act. The injustice of the rule has been lamented over by distinguished English Judges. There is no justice in suspending the whole rent, however small or inconsiderable the eviction. The Section of the Transfer of Property Act makes it clear that payment of rent is a condition precedent to the insisting upon the covenant for quiet enjoyment. On analysis, it will be found that the English rule is based on no reasonable basis. The only remedy of the tenant is to claim to set off the damages if any sustained by him as against the landlord's claim of rent, as equitable set off.

Judgment:—The question for decision in this Second Appeal is whether the plaintiffs are entitled to recover from the defendant the rent of two villages for Fasli 1315. The defence to the claim is that the plaintiff's lessors seriously obstructed the enjoyment of the villages by the defendant in that year, by which she sustained loss to the extent of Rs. 1,300 and that the plaintiffs are, therefore, not entitled to claim any rent for that year. The amount of rent due for the year according to the contract of lease was Rs. 1,245-12-3. The plaintiffs are alleged to have obstructed the lessee's enjoyment both of certain Karuvela trees and the paddy lands. With regard to the former, both the Lower Courts have found that the obstruction was not of a substantial character. With respect to the paddy land, both Courts have concurred in finding that the plaintiffs, having brought the villages to sale for arrears of rent for previous faslis in November 1905, and purchased them at the auction sale, took steps to exercise their right as purchasers and sent an order to the Curnam, Exhibit Va, dated the 26th November 1905 directing him to conduct all operations in the villages under their orders as they had become the owners. They then moved the Magistrate to restrain the defendant from interfering with their enjoyment of the villages, alleging that they were in possession as purchasers. The Magistrate took steps in consequence to preserve the peace, and the defendant, while she denied the plaintiffs' possession of the villages, consented to the produce on the lands being harvested under the supervision of a Village Munsif. The Curnam refused to send the usual accounts to the defendant. On account of the delay in the harvesting of the crops in consequence of the obstruction and on account of rains, the defendant sustained some damage. We may note that the rent sale was subsequently set aside as irregular and illegal. The Subordinate Judge does not find what loss the defendant sustained. He says that the delay was only for about 3 weeks, and that the plaintiffs themselves did not collect any portion of the rent from the ryots in possession;

and he concludes, " I find it impossible to hold that the defendant's enjoyment was so materially interfered with by any permanent act of the plaintiffs or their men as to lead to the conclusion that the defendant was not able to have peaceable enjoyment in 1315 and that the plaintiffs' acts amount to such an obstruction to enjoyment as to suspend the plaintiffs' claim for rent for that year." He was of opinion that the defendant's proper course, if she sustained any damage, was to take independent steps for recovering it. He held that the defendant would be entitled to suspension of rent "for the period when there is substantial and material obstruction to her enjoyment by the landlord." The District Judge observes that the defendant has not shown that she sustained a larger damage than a sum between Rs. 500 and Rs. 900 and says " I do not consider that the plaintiffs' interference can be regarded as a substantial interference of defendant's enjoyment of the village, and it appears at most to have been a temporary obstruction which was soon removed and for which she may obtain damages." We are unable to agree that if the plaintiffs' obstruction caused a loss of Rs. 900 or thereabouts, the obstruction would not be of a substantial character, the total income of the village being about 2,200. The learned Judge apparently did not think it necessary to record a definite finding on the question of the amount of the loss sustained by the defendant, because, according to the view he took of the interpretation to be placed on Section 108 of the Transfer of Property Act, even if there was substantial obstruction of the defendant's enjoyment by the plaintiffs, that would be no answer to this suit for rent. Clause (*c*) of that section enacts " that the lessor shall be deemed to contract with the lessee that if the latter pays the rent reserved by the lease and perform the covenants binding on the lessee, he may hold the property during the time limited by the lease without interruption." Clause (*l*) provides " the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent on his behalf." Taking the two clauses together, he holds that " in order that a lessee might claim the benefit of an implied covenant for uninterrupted enjoyment of the leased property, it is necessary as a condition precedent, that he should comply with the provisions of Section 108 (*l*), *viz.*, that he should pay or tender at the proper time and place the rent payable by him." At the same time he thinks that the lessee might sue for damages caused by the obstruction. We can hardly suppose that the Judge means that the tenant should first pay the rent, and then claim repayment of it, in virtue of the covenant for quiet enjoyment. Probably what he means is that the tenant after paying the rent may claim against the landlord damages

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for breach of the covenant for quiet enjoyment. If clause *(c)* must be construed to require " that the contract between the lessor and lessee should be taken to be that the prior payment of rent is a condition precedent for the tenant's right of quiet enjoyment, we have no doubt that this condition can apply only where the tenant attempts to enforce the covenant for quiet enjoyment by a claim for damages. It may not be unreasonable to say that before the tenant actively asserts his claim to damages he must perform his own obligation to pay or tender the rent due to the landlord, though it is difficult to see the necessity for doing so, especially where the damage sustained exceeds the rent reserved. We are not convinced that on the right construction of clause (*c*) the actual prior payment of rent is intended to be a condition for the right to enjoy without interruption. The clause does not purport to confer any right or cast any liability on the lessor or lessee as a matter of law, but to state that a certain contract shall be taken to have been entered into between the parties. Now, suppose an instrument of lease says "If you pay the rent and perform your covenants you may hold the property for 20 years." This need not necessarily mean anything more than that if the lessee is unwilling to pay the rent reserved or to perform his other covenants, *i. e.*, obligations under the lease, he would have no right of quiet enjoyment. We can hardly think of any good reason for enacting a provision that the failure to pay a single instalment of rent should deprive a lessee of the right to continue in enjoyment of the leased property. It is hardly necessary to say that such is not the English law. The right to re-enter on non-payment of rent is confined, according to that law, to cases where there is an express covenant for 're-entry.' Section 111, clause (9) shows that the law is the same in this country. Section 114 goes further and provides in such cases for granting relief to the lessee against forfeiture for non-payment of rent. The usual clause in instruments of lease in England was " Paying the rent &c.," you shall be entitled to hold &c. The Courts have not construed this to mean that actual payment of the rent is a condition for the right to hold for the stipulated term. See *Dawson* v. *Dyer*,[1] and *Edge* v. *Boileau*.[2] No doubt, where an unusual privilege, such as a right to a renewal of the lease, is granted, if the lessee pays the rent in time, the Court may be inclined to construe the observance of the covenant as a condition to be satisfied to entitle the lessee to the privilege. See *Bartin* v. *Bidwell*.[3] We think there are good grounds for holding that notwithstanding the conditional form of the clause

1. (1833) 110 E. R. 996
2. (1885) 16 Q. B. D. 117.
3. (1881) 18 Ch. D. 238.

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in clause (*c*) of section 108, it was not intended to make the right to the benefit of the covenant for quiet enjoyment conditional on the actual payment of the rent. At any rate, we are clearly of opinion that, if the clause is to be read as importing a condition, it can only be so read in cases where the lessee claims actually to enforce his right to damages for breach of the covenant for quiet enjoyment.

The Transfer of Property Act does not in reality deal with the question of the lessee's right to withhold payment of the whole or part of the rent where his possession of the premises has been seriously obstructed by the landlord. Section 108 does not deal with the defence to an action for rent. It enacts that the lessor is bound on the lessee's request to put him in possession of the property, but does not say that if he does not do so, the lessee is not bound to pay the rent. But there can be no doubt that the Transfer of Property Act has made no change in the rule that non-delivery of possession of the premises is a good answer to a suit for rent. See *The Zemindar of Viziangram* v. *Behara Suryanarayana Pantulu.*[1]

The basis of the defence, where the lessor has obstructed the lessee's enjoyment, is that in case of continuous relationships involving mutual rights and obligations, a party who repudiates and acts in violation of his obligations cannot claim to enforce his own rights against the other party. Hence a lessee who abandons his lease is not entitled to complain of dispossession by his landlord. See *Obhoya Charam Bhoora* v. *Koilash Chunder Dey.*[2] To use the language of Mr. Adam in his Landlord and Tenant, "a rent service is something given by way of retribution to the lessor for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this, that the land demised is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for the thing he has not. If therefore the tenant be deprived of the thing, the obligation to pay the rent ceases; because such obligation had its force only from the consideration which was the enjoyment of the thing demised." In England, the defence is raised in the form that the tenant has been evicted from the premises and is therefore entitled to suspension of the rent during the period of eviction. See Woodfall's Landlord and Tenant, page 476. Foa on Londlord and Tenant, page 134. But eviction has been found not to be an appropriate word; and the Courts hold that there is constructive eviction where the landlord without turning the tenant out of possession commits unlawful and

1. (1901) I. L. R. 25. M. 587.
2. (1887) I. L. R. 14. C. 751.

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wrongful acts which deprive the tenant of the beneficial enjoyment and use of the property; such wrongful acts amount in law to constructive eviction, and the tenant enjoys immunity from the payment of rent until the londlord again permits him to have quiet enjoyment. This principle has been enunciated in a series of cases. See *Dhunput Singh* v. *Mahomed Kazim Isphain*[1] *Harro Kumari Chowdrani* v. *Purna Chandra Sarabogya*,[2] *Rai Charan Shur Mazumdar* v. *AdministratorGeneral of Bengal*[3] *Mahomed Jeanblya Mean* v. *Sukheannessa Bibi*[4] *Purna Chandra Sarbajna* v. *Rasik Chandra Chakraborti.*[5] We are clearly of opinion that the Transfer of Property Act has made no modification of the law in this respect. The learned vakil for the respondents contends that, as the obstruction in this case was only for a short time and the tenant obtained possession of the villages afterwards and was in enjoyment during the remainder of the fasli, she is not entitled to withhold payment of the whole of the rent. We do not deal with this contention at present, because, before disposing of the case finally, we consider it desirable to request the District Judge to submit a clear finding on the question—what damage did the defendant sustain in Fasli 1315 in consequence of the plaintiffs' obstruction of her enjoyment? And we accordingly do so.

Mr. Anantakrishna Aiyar further contends that, as the defendant consented to the harvesting of the crops by the Village Munsif, she cannot now complain of obstruction by the plaintiffs; but the obstruction commenced several weeks before the defendant's consent referred to, and the consent can be construed only as a forced abandonment of the premises for a time in consequence of the obstructions. According to some authorities adandonment is even necessary to enable a tenant to claim immunity from rent. See Mr. Adam on Landlord and Tenant, page 1293. The finding will be submitted within one month from the date of the receipt of this order. Seven days will be allowed for filing objections. Fresh evidence may be adduced on both sides.

In compliance with the above order the District Judge of Madura submitted the following finding.

That defendant's loss was Rs. 720. That such loss was due to the obstruction of the other party, that the harvest was delayed from 1st to 19th March and not finished till considerably later, and the damage may be attributed entirely to the delay. On receipt of the finding the Court delivered the following

1. (1886) I. L. R. 24 C. 296.
2. (1900) I. L. R. 28 C. 188.
3. (1909) I. L. R. 36 C. 856.
4. (1910) 14 C. W. N. 446.
5. (1886) 13 C. L. R. 119.

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Judgment:—The District Court has submitted a finding that the loss sustained by the defendant in consequence of the obstruction to her enjoyment caused by the plaintiffs was Rs. 720. It is contended for the defendant that as there was material obstruction to her enjoyment of the leased premises during Fasli 1315, she is entitled to an entire suspension of rent for the year and the plaintiffs are not entitled to recover any amount. This contention was urged before our order of remand; but we reserved the consideration of the question until the return of the finding. As already pointed out in our remand order the Transfer of Property Act does not deal with the question of the lessee's right to withhold payment of the whole or part of the rent when his possession has been obstructed by the landlord. For the appellant several decisions of the Calcutta High Court have been cited in support of the contention that she is not bound to pay any portion of the rent. The question does not seem to have been definitely decided by this Court in any previous case nor apparently by the High Courts of Bombay and Allahabad. As observed in the remand order rent is paid by the tenant in consideration of her enjoyment of the land demised to her and *vice versa* it must be held that the payment of the rent is the consideration which the tenant is bound to render to the landlord in lieu of her enjoyment of the land. *Prima facie* therefore, it appears to be reasonable that where the tenant continues in the occupation of the land demised to him and receives the income thereof he should be bound to pay rent to the landlord even though his income may have suffered some diminution in consequenee of the landlord's obstruction. But it is argued that we should follow the decisions of the Court in England, in which, it is laid down that where there has been such material obstruction by the landlord of the tenant's enjoyment as would be regarded tantamount to eviction, the landlord should not be entitled to recover any portion of the rent. It cannot be contended that those decisions are binding on the Courts in India; and before we adopt them it is our duty to consider whether they are based on general principles applicable to this country. If the tenant's enjoyment is obstructed he is, no doubt, entitled to damages for such obstruction; but it does not appear to follow from this that, while in enjoyment of his landlord's premises he should be entitled to withhold altogether the consideration due to the landlord for such enjoyment. Where rights *in rem* over property are created by contract of parties, ordinarily each party is entitled to enforce his rights as against the other and neither party can refuse to perform his obligation on the ground that the other party has not performed his. Such is, undoubtedly, the law in the case of a

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contract of sale and also in the case of mortgages except perhaps in one respect that when the mortgagee has failed to advance the whole amount secured by the instrument of mortgage, the mortgagor cannot be compelled to repay more than the amount advanced.

In the case of a lease which involves a relationship giving rise to recurring obligations between the lessor and lessee the law applicable to covenants has been applied so as to modify that applicable to rights *in rem.* The ordinary rule obtaining with regard to obligations arising from covenants is, no doubt, that one of the parties to a contract cannot demand of the other party the performance of his obligations unless he has himself performed all his own obligations or is prepared to do so and the repudiation of his obligations by one party may, in some cases, entitle the other to rescind the contract. Applying this rule, it may be held that if the landlord does not put the tenant in possession of the whole of the premises leased, the latter is not bound to pay any portion of the rent. If the landlord is unable to do so, the tenant may be entitled to rescind the lease, but it does not follow that he would be entitled to insist on keeping possession of a part of the premises and yet refuse to pay any rent for that part. When the landlord has already put the tenant in possession of the property leased his initial obligation to the tenant has been performed; but, as the relationship is continuous it will be a breach of his obligations arising from the relationship of lessor to deprive his tenant subsequently of the possession of any portion of the leased premises. But if he does so, what is the resulting right of the lessee? It may be open to him to say that he is not willing to enjoy only a portion of the premises paying proportionate rent and that until the landlord restores possession of what he has wrongfully taken, he is not willing to perform the obligations of a lessee at all but would treat it as rescinded during such time. But in that case it seems to be clear that it would be his duty to restore to the landlord the part of the premises still remaining in his occupation and not to retain possession of them until he is put in possession again of the whole of the lease property. It must be admitted that this is not the manner in which the law has developed in England.

It would seem that the reason for the rule adopted in England was originally connected with the feudal system which once prevailed in that country. In Bacon's abridgment Vol VII, page 62, it is stated that "no man may be encouraged to injure or disturb his tenant in his possession whom by the policy of the feudal law he ought to protect and defend." Other reasons were subsequently

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given in support of the rule. Thus the Chief Justice Haine says in *Hodgkins* v. *Robson*. "If the lessor enters into a part by wrong this would suspend the whole rent for in such a case, he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." Baron Gilbert in his treatise on Rent gives a third reason. He says (page 178) "Because by the demise every part of the land was equally chargeable with the whole rent, therefore, the lessor shall not, by his own act, discharge any part from the burden during the continuance of such contract." It will thus be seen that the original reason for the rule in England based on the obligation of a Lord to his tenant according to feudal principles is not applicable in this country. The later reasons hardly meet the injustice of the tenant keeping possession of the landlord's land and still refusing to pay any rent for it. It need hardly be said that there is no general principle of law against the apportionment of rent. It is allowed where either the reversion or the tenancy has become severed so that different persons are in possession of portions thereof and the severance may take place either by law or by the act of the parties. See Halsbury's Laws of England Vol. XVIII, page 484. The disallowance of it where the landlord has deprived the tenant of a portion of the premises and the tenant without giving up possession of the remainder retains it is apparently due to historical causes which affected the development of the English law. A different rule is adopted in America. In Mc. Adam's Landlord and Tenant, page 1293, the law is stated thus "It is an elementary rule in regard to constructive eviction that the tenant must abandon the possession of the premises to the landlord for he cannot claim that he has been forced to go out while he remains in." In American Cyclopædia of Law and Procedure Vol. XXIV, page 1130, it is observed "there can be no constructive eviction without the surrender of possession of the premises by the tenant." Even in England it does not seem to be absolutely settled that the landlord would not be entitled to any portion of the rent where the tenant has not been deprived of possession of the whole of the land. Lord Esher preferred to express no opinion on it in 22 Queen's Bench Division, p. 74.

Foa in his work on Landlord and Tenant says that the question was not really decided in the earlier English case, of *Neale* v. *Mackenzie*[1] and *Reeve* v. *Bird*[2] and he cites the cases of *Stokes* v. *Cooper*[3] as an authority for the opposite view Again, apportionment of rent is allowed where the eviction of the tenant is not the result of a wrongful act of the landlord, but of

1. (1836) 1 M. and W. 747. 2. (1834) 1 Cr. M. and R.
3. (1814) 3 Camp. 514 N.

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a personal holding by title paramount. In *Inambandi Begum* v. *Kamaleshwari Pershad*,[1] the Judicial Committee of the Privy Council apparently did not consider that there was any such rule applicable in this country. The case was decided on the footing that the tenant was evicted from a portion of the premises and the landlord was held entitled to a decree for rent for the portion of which the tenant was in possession although the question now under discussion was not definitely raised and decided. In *Gopanund Jha* v. *Lalla Gobind Pershad* [2] the tenant was evicted from the part of the land by title paramount. Sir Barnes Peacock held that the landlord was entitled to rent for the remainder, following the English rule. The Calcutta High Court has also held that apportionment might be allowed where a tenant's loss of possession is due to the wrong of a third party or to an act of nature as for example, by diluvium see *Rasheswari* v. *Saurendra Mohun*[3]. The Calcutta cases generally lay down that where there has been an eviction from even a part of the premises the whole rent is suspended. See *Sarip Jan Bibi* v. *Aftaluddin Miah*[4] and earlier cases cited therein. But it can hardly be said that the rule has been settled in that Court. In *Raicharan Shai Mazumdar* v. *Administrator General* of Bengal,[5] Harington J. abstained from expressing any opinion on the question. In *Annada Prosad Mukhopadhya* v. *Mattura Nath Nag Mazumdar*,[6] Chitty and Vincent JJ., were of opinion that the English rule was not applicable in this country. After referring to the earlier cases Chitty J., observes "I do not propose to enter upon an elaborate discussion of the English cases. It may be questioned how far the technicaliteis to be found in the English Law should be allowed to affect the relations of landlord and tenant in this country. In one respect the principle underlying the English decisions appears to be inapplicable to the present cases. Eviction is regarded as a wrong done by the landlord to his tenant for which the former is to be penalised." Justice Vincent took the same view. In *Kali Prasanna Khesnabish* v. *Mathura Nath Sen* [7] where a tenant was deprived of the possession of portion of his holding by other tenants of the landlord whose leases were made subsequent to his own but remained in possession of the remainder, Brett and Sharfuddin, JJ., held that he was bound to pay rent for that portion. In *Dhumput Sing* v. *Mahomed Kazim Ispahain*, [8] Ghose and Hill, JJ., allowed apportionment where the rent had been

1. (1894) I. L. R. 21 C. 1005.
2. (1869) 12 W. R. 109.
3. (1909) 11 C. L. J. 604.
4. (1910) 13 C. L. J. 115.
5. (1909) I. L. R. 36 C. 856.
6. (1909) 13 C. W. N. 703.
7. (1907) I. L. R. 34 C. 191.
8. (1896) I. L. R. 24 C. 296.

separately fixed on the portion from which the tenant was evicted and the portion of which he retained possession although the covenant for rent was entire. In our opinion, it is difficult to hold on principle that the landlord is not entitled to any portion of the rent if the tenant remains in possession of a portion of the land let. He must be held entitled to it on the contract of lease, since the tenant prefers not to throw up the lease during the period of eviction or as compensation for use and occupation and it would in our opinion be reasonable to hold that the tenant, where he retains possession of a portion of the land, must be estopped from pleading that he is not liable for the rent of that portion. Strictly speaking, where the tenant has once been let into occupation of the premises leased to him his right in law, where he is deprived of possession of a part thereof, is only to damages while he is liable to pay the rent; and it is only a rule of convenience that he should be allowed to enforce his right to damages by setting them off in the landlord's action for rent. We, therefore, hold that deducting the amount of Rs. 720, the damages found to have been sustained by defendant the plaintiff is entitled to the rent claimed for Fasli 1315. The decrees of the Lower Courts will be modified accordingly. The plaintiff and defendant will pay and receive proportionate costs in all the courts.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Wallis and Ayling, JJ.*

Rama Brahmam and others... *Plaintiff.* (*Appellant*).

v.

Venkatanarasu Puntulu and others ... *Defendants* (*Respondents.*)†

Limitation Act (1908) S. 31—"Mortgage"—Essentials.

Formal transfer of interest and an express power of sale are not essential elements of a mortgage. A covenant to pay is an essential element of a simple mortgage. A charge created by act of parties, on specific immoveable property, for a debt and containing a covenant to pay is a mortgage within the meaning of S. 31, Limitation Act.

Rama Brahmam *v.* Venkatanarasu Puntulu.

Second Appeal from the decree of the District Court of Guntur in A. S. No. 143 of 1907 presented against the decree of the Court of the District Munsiff of Bapatla in O. S. No. 545 of 1906.

A. Krishnaswami Aiyar for appellant.

T. Prakasam and E. V. R. Sarma for respondents.

This is a suit for sale of lands mortgaged to plaintiff in 1866. The suit was filed under the benefit of S. 31 of the New Limitation

* S. A. 738 of 1910. † 1st May 1912.

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Act. The lower court dismissed the suit on the ground that the document was not a mortgage but created only a charge. The document was as follows:—

The amount due to you on taking accounts is Rs. 230. Interest thereon shall be at one per cent per month. For this principal and interest I have mortgaged to you my Inam land in the village of X. I have now leased out the said land to tenants for 5 years at Rs. 36 per year which I have arranged that they shall pay you direct and made them give you agreements. After that I shall leave out to others and make them pay you the annual cist. Should any obstruction be caused to the payment of cist by the ryots I shall myself be liable therefor and keep the said land under mortgage until the debt is discharged and I shall be liable to the said terms and act accordingly.

A. Krishnaswami Aiyar.—The document is a mortgage and not a charge for the reasons stated in *Balasubramania Nadar* v. *Sivaguru Nadar*[1] *Datta Dudheshwas* v. *Vithu*[2]. No covenant to pay is necessary for a simple mortgage ; *Abbakke Heggadappa* v. *Kinhiamma Setty*,[3] *Wahid-un-nissa* v. *Gobardhan Das.*[4] The document expressly states it to be a mortgage and there is also a covenant to pay annually if the tenants fail to pay.

T. Prakasam. The Full Bench decision in *Rangasami* v. *Muthukaruppa* [5] is not referred to in *Balasubramania Nadar* v. *Sivaguru Nadar* [1] which is therefore wrong. [Wallis, J. What is meant by 'mortgage' under S. 31 of the New Limitation Act ? That is the question.] *Narayana* v. *Venkatarama* [6] which gave rise to the Privy Council decision and *Ramachandra* v. *Moothoo* [7] refer to *Papama* v. *Virada* [8] in which also there was a covenant to pay. I refer to S. 58, Transfer of Property Act. The word used for mortgage is 'Thakkatta' which does not mean mortgage. It is the annual list that is made a charge.

A. Krishnaswami Aiyar in reply. The reasoning in *Rangasami* v. *Muthukarppa* [5] and *Aliba* v. *Nanu*[9] is against *Sri Raja Papama* v. *Virada* [8] see also Macpherson on Mortgages p. 14.

The Court delivered the following.—

1. (1909) 21 M. L. J. 562, 568.
2. (1895) I. L. R. 20 B. 408.
3. (1906) I. L. R. 29 M. 491.
4. (1900) I. L. R. 22 A. 453, 461.
5. (1887) I. L. R. 10 M. 509.
6. (1902) I. L. R. 25 M. 220, 223.
7. (1898) I. L. R. 21 M. 326.
8. (1896) I. L. R. 19 M. 249 (P. C.)
9. (1886) I. L. R. 9 M. 218.

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Judgment.—The question raised in the Second Appeal is whether this is a suit for sale by a mortgagee within the meaning of that term as used in S. 31 of the Indian Limitation Act 1908, which gives mortgagees in the Presidencies of Madras and Bombay, and the United Provinces and certain other territories mentioned in the second schedule among other things a further term of two years from the passing of the Act in which to sue. The reason for this legislation is, as is well-known, that many mortgagees had been misled by the decisions of the Courts as to the effect of the construction of Article 147 in the Limitation Act of 1877 into believing that the period of limitation for suits on their mortgagees, was sixty years under Article 147, whereas according to the decision of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai*[1] it was only twelve years under Article 132. The lower courts have decided that the instrument sued on is not a mortgage but a charge on the authority of *Aliba* v. *Nanu*[2] and *Rangasami* v. *Muthukumarappa*[3] and that consequently the plaintiff is not mortgagee within the meaning of S. 31 and as such entitled to sue within two years from the passing of the Act. These cases proceeded on the erroneous view that Article 147 and not Article 132 was the article applicable in the case of all suits on mortgages, but limited the effect of this ruling by putting a restrictive construction on the word 'mortgages' and holding that mere hypothecations or simple mortgages were only charges and that suits on them were accordingly governed by Article 132. It cannot, however, be said that the tests suggested in those cases for distinguishing a mortgage from a charge, as, whether there was an express power of sale and whether there was an express transfer of interest were accepted even by the other courts which took the same view of Article 147; and we see no reason for thinking that the legislature used the word 'mortgage' in the very restricted meaning put upon it by the Madras High Court in these cases.

The distinction between a mortgage and a charge has been discussed in a recent case [*Balasubramania Nadar* v. *Sivaguru Nadar*[4]—Ed.] in this court but without reference to the above decisions. The tests suggested in argument were that a mortgage must be erected by act of parties, must be for a debt, must be of specific property and must involve a covenant to pay. *Krishnasawmi Aiyar*, J. in dicussing the question rejected the two tests laid down in the two cases which the lower courts have followed—that there must be a formal transfer of interest and express power of sale —and held that a covenant to pay is an essential element of a simple

1. (1907) I. L. R. 30 M. 426.
2. (1886) I. L. R. 9 M. 218.
3. (1887) I. L. R. 10 M. 511.
4. (1909) 21 M. L. J. 562, 568.

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mortgage. The deed in the present case is described by a term which is translated 'mortgaged' but is explained as meaning 'pledged.' It is created by act of parties, is of specific immoveable property, is for a debt and contains a covenant to pay. It further entitles the mortgagee to such possessions as the case admits of, *viz.*, receipt of the rents and profits during the continuance of the mortgage. We think there can be no doubt at all that this instrument is a mortgage and that the plaintiff is a mortgagee within the meaning of S. 31 of the Indian Limitation Act and entitled to sue.

As the District Munsif has returned the finding on all the issues, we merely set aside the decree of the Lower Appellate Court and remand the case to the Lower Appellate Court for disposal according to law. Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim, and Mr. Justice Sundara Aiyar.*

K. A. Veeraraghava Thatha Chariar and others. } *Appellants.* { *(Plaintiffs* 1, 3, 6, 7, 9 *to* 11).

vs.

T. Srinivasa Thatha Chariar, and others. } *Respondents.* { *(Plaintiffs* 2, 4, 5, 8 *and* 12 *and Defendants* 1 *to* 15 *and party Respondents.)*†

Veera-raghava Thatha Chariar v. Srinivasa Thatha Chariar.

C. P. C. XIV of 1882, S. 539—New Code S. 92—Scheme—Considerations for Court—Rights of parties—New trustees—Limitation Act Article 124—Continuous possesion—Independent trespassers—Addition of parties in Appeal—Old and New Code—Retrospective effect.

A Court in framing a scheme regarding a temple is bound to have regard to the existing rights of individuals to the trusteeship of the temple.

Twelve years' continuous possession is necessary under Article 124 to bar a right to trusteeship; and if the possession has been in the hands of independent trespassers it would not be regarded as continuous possession on the part of the defendant-trespasser; but where the independent trespassers have all derived title from the same source it may be sufficient to justify a Court in holding that the possession was continuous within the meaning of the article.

Courts are averse to the creation of a hereditary right to the office of a public trustee.

Obiter:—Courts in India have the same powers as the Court of Chancery in England to appoint additional trustees; and certainly so under S. 92 (C. P. C. of 1908.)

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*A. S. No. 212 of 1909 † 26th April 1912.

Veeraraghava Thatha Chariar v. Srinivasa Thatha Chariar.

Appeal from the decree of the District Court of Chingleput in O. S. No. 11 of 1907.

This suit is for a scheme for the Conjeevarem Temple and the first question in the appeal is whether the Court has power to appoint additional trustees.

T. V. Seshagiri Aiyar for the Thengalais, the new respondents.

Before the suit was decided in the lower court on 4th March 1909 the new C. P. C. had come into force. In the old Code, S. 539 the words were " appointment of new trustees under the trust". In the new code the words ' under the trust' are taken away. Even under the old code additional trustees could be appointed. *Tripati* case.[1] This view was not dissented from in the Privy Council on appeal.[2] In the argument before the Privy Council the real complaint was not that a co-trustee ought not to be appointed but that the co-trustee or the umpire should not be a servant. See the argument in *Tripati* case.[3] I refer also to *Ramadoss* v. *Hanumantha*[4] to show that the High Court's decision in *Tripati* case[1] still remains good law in spite of the decision of the Privy Council. Similar is *Krishnayya* v. *Subbayya*[5] I rely also on the several observations in *Kaliswara* v. *Nataraja.*[6] The Bombay authority is *Manohar* v. *Lakshmiram* [7] approved in *Chotalal* v. *Manohan Ganesh* [8] see also *Annaji* v *Narayan* [9] where a committee was appointed to control. The English rule is stated in 4 Halsbury 265 Article 510 ; Tudor on Charities 4th Ed. 314, and 324. American Cyclopædia 957. For cases of similar schemes See *Annaji* v. *Narayan* [10] and *Chintaman Bajaji* v. *Dhondo Ganesh.*[11] Hereditary trustees can be removed for misconduct *Fackruddin Sahib* v. *Ackeni Sahib*[12] *Muthkumara* v. *Palaniappa*[13] P. R. Ganapathy Aiyar's Religious Endowments Introduction CC. and LVIII. For power to appoint additional trustees, see also Lewin p. 824.

T. R. Ramachandra Aiyar. There is a distinction between appointing a new trustee and appointing additional trustee. S. 539, C. P. C. of Act 1882 is borrowed from Lord Romilly's Act. See also the English Trustees" Act 1893, Quoted in Tudor p. 324

1. (1905) I. L. R. 28 M. 319.
2. (1907) I.L.R. 30 M. 138. (P.C.)
3. (1907) 20 M. L. J. Sup. 6.
4. (1911) 10 M. L. T. 356, 359.
5. (1911) 21 M. L. J. 784.
6. (1909) 19 M. L. J. 772, 777.
7. (1887) I. L. R. 12 B. 247, 266.
8. (1899) I. L. R. 24 B. 50 (P. C.)
9. (1896) I. L. R. 21 B. 556.
10. (1896) I. L. R. 21 B. 556.
11. (1888) I. L. R. 15 B. 612.
12. (1810) I. L. R. 2 M. 197.
13. (1911) 10 I. C. 300.

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which has made it clear by adding words 'new trustees' in substitution for or in addition to old trustees. [*Court.*—Why should not the word new include both kinds ?]. The very reason that committees were appointed only in some cases and not in others shows clearly that additional trustees could not be appointed in cases of hereditary trusts. The court has no power to appoint additional trustees. Such appointment was in fact cancelled in Tripati case[1] by the Privy Council. They say "without imparing the authority of the Mahant as the duly constituted trustee of the temple." A decision which not only not approved of but reversed is not an authority. In *re Burnham National Schools.*[2] This is the only case for the appointment of additional trustees: none of the English and Amercian cases are cases of hereditary trusts.

In the present case sanction is asked for for only a scheme and there is no prayer in the plaint for appointment of an additional trustee. We cannot enlarge the scope of the suit as sanctioned; *Sayed Hussain* v. *The Collector of Kaira*[3] and *Srinivasa* v *Venkata*[4] S. 539, C. P. C. has separate paragraphs for the appointment of new trustees and for a scheme.

T. V. Seshagiri Aiyar in reply. A prayer for a scheme includes a prayer for appointment of additional trustees; Tudor 257.

Additional trustee can be appointed without removing the old. *Narayana Aiyar* v. *Kumarasami Moodaliar*[5].

The next point that was argued was whether the 1st defendant was entitled to exclusive trusteeship.

T.R. Ramachandra Aiyar. The 1st defendant's uncle was given the sole trusteeship and that too hereditarily by the Government. Then 1st defendant's father acted as trustee and then the 1st defendant up to date. [P. R. S.—Is not the effect of your taking some others with you to extinguish your exclusive right?] No I took them only as associates to help me. [P. R. S.—Is not the effect of your various agreements to members of the Thathachar family to recognise a right to the trusteeship in them or at least a right of nomination in them? Did you not by that surrender your previous right if any and derive it from them?] No. Trusteeship cannot be surrendered. The other Thathachars were not trustees: they did not hold possession as

1. (1907) I. L. R. 30 M. 138 (P. C.)
2. (1873) 17 Eq. 241.
3. (1895) I. L. R. 21 B. 250.
4. (1887) I. L. R. 11 M, 148.
5. (1899) I. L. R. 23 M. 537, 540.

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trustees. Adverse possession as against me cannot be acquired by those whom I associated with me. At the worst it may be said that I am a joint trustee with my associates. The Vakil then argued on the effect of *Nilakandhen* v. *Padmanabha*,[1] *Ramanathan* v. *Murugappa*,[2] *and Secretary of State* v. *Krishnamoni*[3] and Articles 124, 142, 144 and S. 10 of Limitation Act.

G. S. Ramachandra Aiyar for 18th respondent. As I was a co-trustee with the 1st defendant for these 60 years I am entitled to succeed along with him.

V. V. Srinivasa Aiyangar for the plaintiff. The original petition of the 1st defendant's ancestor to the Government for trusteeship and the Government's order thereon both show that the trusteeship was conferred on the Thathachar family in general, hereditarily and that 1st defendant's ancestor was appointed only as their representative. At any rate it was so understood, by all, then and subsequently and their conduct inferrable from the many agreements is to the same effect [*Sundara Aiyar* J. Then how do you claim trusteeship hereditarily to all the families of Thathachariars ?]

'Hereditarily' does not mean by descent by primogeniture and in this case it did not so descend even in the first defendant's family.

The 1st defendant is by his conduct estopped from disputing the right of Thathachars in general as they by his submitting to nominations by them influenced them from not applying to the Government for trusteeship later on moreover there are admissions by 1st defendant's ancestor that he got the appointment only by Thathachar's voting. There is no evidence that 1st defendant's family was continuously in possession and that too as of right. Surrender of trusteeship if any,was to the community. Trusteeship can be surrendered. Right to appoint is a lesser right. If the intention was to prescribe only for a limited interest then that right alone will accrue *Jamuna* v. *Dhondi*[4] *Annasami* v. *Rama Krishna*[5] [*Sundara Aiyar*, J. Office of Trusteeship of a temple is public right and it is extra *Commercium*. How can it be the subject matter of a contract interse] Relinquishment in favour of the members of the family who originally held it is valid. *Annasami* v. *Rama Krishna*[5].

S. S. Setlur. In all the agreements, all the families of Thathachariars claim the miras of Dharmakartaship. The actual persons who

1. (1894) I. L. R. 18 M. 1.
2. (1903) I. L. R. 27 M. 192.
3. (1902) I. L. R. 29 C. 518 (P.C.)
4. (1902) 5 Bom. L. R. 186.
5. (1900) I. L. R. 24 M 219.

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acted are only managers and delegates. [*Court.*—They were not only appointed as trustees but they actually acted as such]. As soon as all Thathachariar assumed the character of elector they got it. *Secretary of State* v. *Krishnamoni*[1].

T.V. Seshagiri Aiyar. The interests of the trust are paramount and describe to be considered more than personal interests. All the Thathachars constitute only one trustee. They were fighting among themselves for the last 100 years and it is owing to such fight that the Government appointed only one trustee in 1842. Similar fight is now going on. So only one from among the Thathachariar should be appointed and the interests of strangers such as Thengalais in the temple are very large and they are much more than those possessed by Vadagalais. Before 1842 Thengalais also were trustees.

Where a suit was instituted while S. 539 of the old Code was in force but heard after S. 92 of the new Code had been enacted, the power of the Court must be regulated by the Code in force at the time of hearing. Courts have wide powers in settling a scheme; if it were necessary to appoint new trustees for making a satisfactory scheme Courts are competent to appoint them.

The Court delivered the following

Judgment:—This is a suit for the settlement of a scheme for the management of the temple of Sri Devarajaswami at Conjeevaram and the shrines attached to it. The temple is one of the most ancient and famous in Southern India. It has unfortunately been also the source of constant and bitter litigation for a very long period of time, not less than a century. The suit has been instituted by certain members of a group of families known as the Thathachars who are all said to be the descendants of one Koti Kanyakadanam Thatha Desikar, a famous scholar who is reputed to have been the priest of Sri Krishna Devaraya, the Rajah of the Carnatic. The original defendants were also members of the same family. Defendants Nos. 1 to 4 are admittedly trustees of the temple and the 19th defendant also claims to have been validly appointed as trustee by a mediator who is alleged to have possessed the power to appoint him. According to the rules of the institution prevailing at the time of the suit, the temple was to be administered by five trustees. These trustees admittedly were to be ordinarily elected by members of the families of the Thathachars, the mediator, it is stated, having the right to fill up the vacancy if the Thathachars fail to exercise their right of election. Defendants Nos. 5 to 8 are the sons of the 1st

1. (1902) I. L. R. 29 C. 534.

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defendant. Defendants Nos. 10 to 15 are other Thathachars who were subsequently added as parties. According to the plaint, the Dharmakartha Mirasi right *i. e.* the hereditary right of Dharmakartaship, belonged to the family descended from Kotikanyakadanam Thatha Desikar (whom we shall hereafter refer to as Thatha Desikar.) But this contention was given up before us at the hearing of the appeal, and nothing more was claimed for the members of the Thathachar families generally than the right to elect trustees and certain rights of interference beyond what ordinary worshippers possessed. The 1st defendant and his sons and certain other families of Thathachars claimed the exclusive right of trusteeship. The plaint after referring to the history of the management of the temple, referred to the present condition of affairs which was stated to be extremely unsatisfactory and set out various acts of non-feasance, misfeasance, and malfeasance on the part of the trustees and stated that a scheme has been framed by Sir V. C. Desika Chariar, then a leading Vakil in Madras (now one of the Judges of the Presidency Small Cause Court) and assented to by about 100 members of the family. But defendants Nos. 1 and 4 to 8 and 9th defendant expressed their dissent while 18 others expressed neither their assent nor their dissent. The plaint then refers to the absolute necessity for a scheme and prays for the settlement of a scheme either by adopting the scheme settled by Sir V. C. Desika Chariar or by framing a new one, and for certain other incidental reliefs. Although the necessity for a scheme was not agreed to at first by all the defendants, the District Judge in his judgment says that it was not seriously disputed by any of the defendants that some scheme of management should be settled and that it was admitted in the course of the hearing that the trustees were not doing their work properly. He also observes that the principal objection urged to the scheme framed by Sir V. C. Desika Chariar was that it proceeded on the basis that the Thathachar family as a whole had the right to the management of the temple and that its provisions were intended to strengthen the position of the family and to see that the trustees obeyed what was dictated by the family as whole or by one nominated by them as middleman or arbitrator. Defendants Nos. 1 and 5 to 8 stoutly opposed this claim and contended that the trusteeship belonged to their own family. The District Judge held that it was beyond the scope of the suit, which was for the framing of a scheme, to go into the question of the exclusive right set up by defendants Nos. 1 and 5 to 8 and he refused to do so. The parties were asked to put in a draft scheme or schemes on the basis of this decision. The Judge refused to frame any rules for the election of trustees,

their supervision and the mode of settling differences of opinion between them. He also refused to appoint any mediators or supervisors to control the work of the trustees, holding that it would not be to the advantage of the institution to appoint men invested with power to control the action of the trustees. He also considered it unnecessary to frame any rules for filling up vacancies in the office of trustee and thought it best to leave this to be done by the Thathachar family. He considered it enough to make provision for the better administration of the funds of the temple and did not consider the question of the constitution of the trustees and their appointment and the individual rights of the parties. He settled a scheme providing for the periodical stock-taking of the moveable properties of the temple, for the receipt and custody of the offerings and the incomes of the temple, for the auditing of accounts and certain other matters. The plaintiffs appeal to this court and other parties including defendants Nos. 1 and 6 to 7 put in memoranda of objections. The District Judge's scheme really did not satisfy any of the parties. The affairs of the temple got into serious confusion during the pendency of the appeal and an application was made to this court for the appointment of a Receiver *pendente lite.* It was considered desirable that the hearing of the appeal should be expedited and that the petition for the appointment of a Receiver should be heard along with the appeal. When the appeal was taken up for hearing, applications were made by several persons to be added as supplemental respondents. These were men representing the Thengalai Community of Conjeevaram and Sthalathars of the temple. They had themselves instituted other suits in the District Court of Chingleput for the settlement of a scheme. They expressed their desire to be made parties to this appeal so that this court might settle a scheme binding on all parties, and agreed, as a condition to their being admitted as parties to the appeal, to withdraw their own suits pending in the District Court and to proceed with the litigation from the point at which it stood in this court without claiming to re-open any proceedings taken hitherto We considered it proper to accede to their request and directed them to be made supplemental respondents. Respondents Nos. 22 to 25 are representatives of the Thengalai community and respondents Nos. 26 to 29 are Sthalathars. The object of these groups of respondents was to induce this court to admit as trustees of the temple respectively, a Thengalai Vaishnava to protect and safe-guard the interests of Thengalais, and a Sthalathar to similarly protect the interests of the Sthalathars.

Defendants, Nos. 1 and 5 to 8 strongly objected to the course pursued by the Lower Court in framing a scheme without making

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enquiry regarding the exclusive right of their family to the trusteeship. We were of opinion that their contention should be upheld, as a court in framing a scheme was bound to have regard to the existing rights of individuals to the trusteeship of the temple. The scheme was also regarded as imperfect in not making provision for several matters of importance. The parties were at the same time anxious that the long pending strife and confusion should be settled as speedily as possible and they requested that this court should itself take the evidence necessary for deciding such questions as would be pertinent to the settlement of a scheme. The parties all expressed themselves as satisfied to have the questions decided on such documentary evidence as they might wish to adduce and to dispense with oral evidence except such as might be tendered to prove or disprove the genuineness of any documents that might be put in. We agreed to this course and passed the following order on the 24th August 1911:—

"The Lower Court was not right in refusing altogether to take evidence relating to the rights of the parties and the practice prevailing in the institutions with respect to the management of affairs. The parties desire that this court should admit in evidence such documents as may be produced by any of the parties and agree to dispense with oral evidence. We have resolved to accede to the request that this court should take the evidence in the case. All parties will produce their documents within two weeks from this date. The printing of the documents might be expedited. The further hearing of the appeal is adjourned for six weeks."

All the parties have had full opportunity of adducing their documentary evidence. No witnesses were cited by any of them. The case was argued at great length on behalf of the various parties. The principal points that formed the subject of contention at the first argument were:—

(1) Whether the family of defendants Nos. 1 to 5 is entitled to the exclusive right to trusteeship in the temple and

(2) Whether additional trustees should be appointed to put an end to the constant and recurring quarrels and litigation connected with the temple and to put the administration of its affairs on a satisfactory footing.

It was contended by defendants Nos. 1 and 5 to 8 and by the Thathachars that the court had no right to appoint additional trustees for a temple managed by hereditary trustees, that we further had no power to do so in this case as the sanction given by the

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Collector under Section 539 of the old code of the Civil Procedure for the institution of this suit did not authorise a prayer for the appointment of additional trustees and that, in any event, such appointment was undesirable and unnecessary. At the conclusion of the arguments we intimated our conclusions on these questions. We held that the alleged exclusive right of the family of defendants Nos. 1 and 5 to 8, if it ever existed, was extinguished by the statute of limitation, that we had the power, if we considered it desirable, to appoint additional trustees, but that in the circumstances of the case we considered it both unnecessary and undesirable to appoint any additional trustees, either from amongst the Thengalais or from amongst the Sthalathars. We also stated that in our opinion it was necessary to control the management of the affairs of the temple by the trustees and that we would be prepared to consider any measure that might be proposed for the purpose. As already stated, the vakil for the Thathachars generally admitted that the members for the family did not claim any right to trusteeship on behalf of all the members of the Thathachar families as a body. We invited all the parties concerned to put in draft schemes for the consideration of the court. We also invited the co-operation of the Advocate-General for the settlement of a satisfactory scheme. He was good enough to lend his assistance in the matter and submitted a scheme for the approval of the court. The contending parties also put in schemes of their own. All these schemes were fully considered at several subsequent hearings, the drafts put in by the parties and by the Advocate-General were revised and the matters in dispute were settled. The parties were supplied with the minutes of the court and schemes drawn up by the parties in accordance with thse minutes were again considered and the scheme as finally settled by the court has already been drawn up. We do not propose to make more than a few further observations regarding details of the scheme we have settled. It now remains to give our reasons for the conclusions arrived at by us on the questions argued at the preliminary hearing.

The early history of the temple is involved in much obscurity. Both the sects of Vaishnavas, the Vadagalais and the Thengalais, certainly possessed important interests in the temple and these have given rise to persistent and unceasing litigation. Another fruitful source of disputes related to the rights of various persons holding offices in the temple, and the litigation between the trustees who have been Vadagalais and Thathachars from the year 1842 and the Vadagalai office holders, chiefly the Archakas and the Paricharakas, has been as acrimonious as the quarrels between the Vadagalais and

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the Thengalais. The trustees have not been remarkable either for their capacity or for their spirit of co-operation. The Thathachar families have constantly tried to interfere in the management probably for good reasons. Both the trustees and the Thathachar families have frequently invited the co-operation of outsiders for the purpose of securing the orderly administration of the temple, but generally these attempts do not seem to have succeeded. The Tengalais and Sthalathars have pressed us to use the large powers possessed by the court to introduce a more satisfactory state of affairs and to make comprehensive changes; and, while declining to appoit additional trustees, we have been anxious to do everything in the power of the court with a view to secure better management, peace and due regard for the interests of the worshippers and office holders, and, for the purpose of doing so, we have fully considered the course of management that has obtained till now and the cause of the confusion and mismanagement that have generally prevailed till now in the administration.

According to the Thathachar plaintiffs, the pagoda of Devarajaswami was renovated by Thatha Desikar, who also procured large endowments for it. They contend that he and his descendants were the Dharmakartas until the British Government took up the management. There is apparently no doubt that Thatha Desikar had a great deal to do with the management of the temple in his time and, probably, with the renovation of the buildings. An image of his is to be found in the pagoda, and it would appear that worship is offered to the image at the expense of the temple. But at the same time there can be no doubt that a Thengalai called Rama Row was at the head of the management towards the end of the eighteenth century. In 1792, the Government's attention was directed to the serious differences then existing between the Tengalais and Vadagalais of the place and enquiries were them instituted into the question of management. The trustee Rama Row was dismissed by Government and one Srinivasa Raghavachari was appointed Dharmakarta by the Board of Revenue. The appointment was made with the consent of the family of the Thathachars and the appointee apparently admitted that the hereditary trusteeship belonged to the Thathachars. This was not however the conclusion arrived at by the Collector, Mr. Balfour. He had first thought that the Thathachars had been Dharmakartas formerly, but on subsequent inquiries he came to the conclusion that the trusteeship originally belonged to a body of persons called Sthalathars, of whom the Thathachars were only one section, the others being the

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Archakas, the Paricharakas, the karnams or accountants and the Mudaliars or carriers of the idol inside the temple. Mr. Balfour said that there were no documents to establish the point at issue and his conclusion was apparently based on such investigation as he could then hold. It would appear that, owing to the apprehension of troubles from the Mahomedan rulers of the Carnatic, the idol had been removed from the pagoda and carried off to Udayarpalayam, where it was detained by the Poligar of the country, that a Tengalai of the name of Attan Jeer, who was in favour with the Nabob of Hyderabad, procured aid from him and brought back the idol from Udayarpalayam and obtained endowments for the temple from the Nabob. Exhibit XII is a deed of gift by one Lalla Mulluji of the family of Todur Mall of the right of management of the temple to "Ramanuja Rayanigaru, son of Attan Jeer." It states that the right of management was given to the donor by "all the people," who were pleased with the service rendered by him in bringing back the idol from Udayarpalayam. Probably both the executant's family and Attan Jeer were concerned in the restoration of the idol to the temple. Rama Row appears to have been a descendant of the donee, Ramanuja Jeer (See Exihibit L.) The Vadagalais stated in 1842 that Rama Row was a gumastah of their own and denied any independent right of trusteeship in him. Whether he was trustee in his own right or whether he obtained it from the Todur Mall family, which got it from the Sthalathars as is apparently stated in Exhibit XII, or whether he was the gumastah of the Thathachars, he was, as already stated, dismissed from office in 1792, and the position of the Thathachars as claimants of the office was greatly improved by the appointment of Srinivasa Raghavachari as Dharmakarta. Government, however, dismissed Srinivasa Raghavachari also in 1796, and assumed the direct management of the temple. But the rights of Rama Row's family to certain privileges and emoluments were recognised by the officers of Government. Exhibit XIII series relate to the proceedings taken by Government in 1792. The temple continued to be under the management of Government up to 1842, when, in consequence of the orders of the Court of Directors, it resolved to disconnect itself from the management of religious institutions in the country. Inquiries were then made to find out what persons had a right to the office of the trustee. Claims were put forward by the members of Attan Jeer's family and by the Sthalathars as well as by Thathachars. The last apparently took joint action and a petition on their behalf was put in by Kumara Thathachariar, the grand-father of the present 1st defendant. He stated that Rama Row and Srinivasa Raghava

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Chari were both gumastahs under his family and claimed that no one else had a right to the Office of Dharmakarta (Exhibit A). The Collector, however, was not in his favour. After pointing out that the Thathachars were not the sole Dharmakartas of the temple at any time and adverting to Rama Row's trusteeship when Government took up the management, he proposed the appointment jointly of the head of the Thathachar family, an Archaka, a Paricharka, Maji Appa Row, a descendant of Rama Row, and a member of the Arlappad, as trustees (ExhibitXIV). The Board of Revenue, however, was of opinion that the appointment of a plurality of trustees was impolitic and undesirable. The Board was satisfied that the Thathachar family at least possessed the joint right of hereditary supremacy in the temple in common with others if they were not the sole controllers of pagoda, and were of opinion that the welfare of the pagoda would be best advanced by the appointment of a single individual as trustee and they resolved to constitute Kumara Thathachariar, the head of the Thathachar family, the sole Dharmakarta, the dignity to be hereditary (Exhibit B). The Government of Madras confirmed the proceedings of the Board, and Kumara Thathachariar, the petitioner on behalf of the Thathachar family, received the following order:—"Petitioner is informed that his claim to the churchwardenship of the Devarajaswami pagoda at Conjeevaram is recognised and the Collector has been furnished with instructions accordingly." The Collector accordingly informed him thus. "You are appointed Dharmakarta of the above Devastanam. You shall therefore at once take charge of all the properties belonging to the above Devastanam from the Tahsildar of Conjeevaram Taluk and shall properly conduct all the affairs of the above Devastanam according to Mamool." It would appear from these documents that the intention of the Revenue Board and the Government was to appoint Kumara Thathachariar individually as sole Dharmakarta in accordance with the policy of Government to appoint a single individual as trustee. Kumara Thathachariar, however, professed to act on behalf of his family and executed an agreement (Exhibit F-1) dated the 9th February 1843 to all the members of the family. In that document he stated that the Dharmakarta office, which was "Samudayam (common) to all the aforesaid descendants" of Thatha Desikar, had been confirmed by the Board of Revenue to them and that he had been appointed Dharmakarta, and that he and the other members of the family had in that agreement made an arrangement in order to prevent future disputes in the family for ever and to save the mirasi office from ruin. It then states that four individuals referred to in the document

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should conduct the business with him and sign the accounts along with him, that he should sign Thakids and the four other persons should sign the copies of those Thakids in token of their approval, that they should sign the original during his absence from the village along with his son on his behalf, that "all our people" *i.e.*, all the members of the family should settle any disputes of the Parijanams relating to the temple and act in the transaction of any special business. Nine of the Thathachars are named as people who should inspect accounts and one of them was also to sign the accounts. It then proceeds to say "If a substitute is to be appointed for those who work rendering assistance to me, all our people who are then present in the village should join and consider and appoint those of our people who are at the time influential and devoted to the performance of services the deity." In case of difference of opinion the view of the majority was to prevail. This agreement seems to allot a somewhat higher position to Kumara Thathachar in the actual management than to the 4 persons who were to manage the business of the office with him. But no right to succession is secured to his heirs, the appointment being made by the Thathachars from amongst the most pious and influential amongst their body. Besides, it substantially acknowledged the joint right of trusteeship of the 4 other persons named in the document.

The agreement was communicated to the Collector but that officer apparently did not wish expressly to recognise it on behalf of Government as having any binding force. He therefore replied as follows:—"Inasmuch as the management of the above Devastanam was given up by Government, it is needless to say whether I have accepted or not the arrangement referred to in the above agreement." Kumara Thathachariar died on the 5th March 1843. Two of the persons named in Exhibit F(1) informed the Collector of the death and stated that an arrangement for the future management of the Pagoda would be made and communicated to the Collector in a short time. He evidently understood the Government Order as recognising that the office of Dharmakarta should be hereditary in the family of the Thathachars and asked for the instructions of Government as to how he was to act with respect to the report made to him. The Board's answer was "that the heirs to the Dharmakarta lately appointed should be recognised as successors in the office" (Exhibit IV). This throws little on the question whether they meant only the heirs of Kumara Thathachari or intended to include any of the other Thathachars. On the 21st July 1843, Sudarsana Thathachar, the son of Kumara Thathachar, and 2 other

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persons, Thundri Viraraghava Thathachar and Tiruppakuli Gopalachar, executed the agreement (Exhibit F2) in favour of all the Thathachars. This document again recites that the office of trustee, was "Samudayam to all the Thathachars" and states that the community had agreed that the 3 executants should be Dharmakartas of the Devastanam. They agreed to consult all the Thathachars in case anything special had to be done and recognised the right of all to fill up vacancies, and the document further states that for any loss or gain in respect of the office all should be responsible. This agreement was also communicated to the Collector, who, in transmitting it to the Board, stated "I have informed them that the interference of Government in the affairs of the Pagoda having ceased, I had only to say that the arrangements made by themselves would be attended to and the Joint Dharmakartas recognised." The Board approved of the Collector's Proceedings (Exhibits J and JI). Shortly afterwards, Appa Row, whose claims to the office of trustee had been set aside by Government, instituted Original Suit 5 of 1844 in the Zillah Court of Chingleput for the recovery of the office from the 3 trustees named in Exhibit F 2. His suit was dismissed and the judgment of the Zillah Court was confirmed by the Court of Sadr Adalat in Appeal No. 29 of 1849, Exhibit L. In that suit, the Thathachars, including Sudarsana Tathachar, the 1st defendant's father, in their written statement (Exhibit K), said "the Board of Revenue and the Government acknowledged that only the descendants of the family of Koti Kanyakadanam Thatha Desikar are the chief claimants of the Dharmakarta office of the said Devastanam and appointed the said Rayadrug Kumara Thathachar as Dharmakarta. After his death, these defendants were appointed Dharmakarthas in his place and have been conducting the management of the Devastanam duly." Sudarsana died in 1856 and he was succeeded by his brother, Krishnaswami Thathachar, the 1st defendant in this suit. On the 24th September 1856, he and Thandri Viraraghava Thathachar and Krishna Thathachar executed the agreement, Exhibit III, in favour of all the Thathachars. This document again recognises the office as common to the whole family and the right of the members of the family to fill up vacancies. In other respects, it is in accordance with the two previous agreements. On the same day, certain rules were laid down by the 3 trustees for the management of the temple (Exhibit F-4). This also recognises the common right of the members of the family. It places all the Dharmakartas on an equal footing and contains the following provision:—"As it is necessary that the documents relating to the disputes which have taken place from the beginning to this day in respect of the Dharmakatritva, etc., Mirasi

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rights, which are Samudayam to all the members of the family of Sri Thatha Desikar in the said Devastanam, should be in the safe custody of one, the said documents should be kept safely with V. Parthasarathi Iyengar and should be taken when required and should be returned." It will be noticed that the depositee was not any one of the Dharmakartas but apparently another member of the Thathachar family. Thandri Veeraraghava Thathachar apparently nominated his own successor but this nomination was set aside by the Board of Revenue. The Board's Order (Exhibit M), dated the 5th July 1859, stated that Veeraraghava had no right except what he obtained by election by the family and said, "The Board approve of the Collector's cancelling that nomination and leaving the selection to the family of Kumara Thathachariar. They decline to interfere on petitioner's behalf." On the 16th August 1857, a number of Thathachars executed an Adhikara Pathram or deed of authority to 3 gentlemen of position, authorising them to frame rules regarding the management of the Devastanam, and stated that those who did not acknowledge the authority of the rules so framed were liable to be excluded from the office. In 1860, again, an agreement, Exhibit F, was entered into by the Thathachars laying down regulations for the management of the temple. The occasion for the agreement is stated to be that the conditions of the previous agreements, Exhibits F1 to F5, were not properly carried out. It recites that the office of Dharmakarta is common to all the members of the family and provides that if any Thathachar should set up a special right he should forfeit his own right to the office. It fixes 10 years as the time limit for the tenure of the office by any individual, Sri Krishna Thathachariar and Krishnaswami Thathachariar, the then Dharmakartas, being alone entitled to hold office for a longer period. The number of trustees was fixed at 3. Three Vraya Sodhakas or Inspectors of expenditure were appointed and they were entitled to be appointed as Dharmakartas in case of vacancy. The agreement was signed by a number of Thathachars including the 1st defendant. Fresh agreements were executed in the years 1872 and 1876 (Exhibits N and O) by the former of these, the number of trustees was raised to 5. It is unnecessary to refer in detail to the provisions of these agreements, but one clause of Exhibit N, *viz.*, the 4th, should be mentioned. It provided "On the occurrence of a vacancy among the trustees, if there should be no person to be appointed for the place in accordance with the aforesaid agreement of Subakrithu year (*i.e.*, 1842), a Vraya Sodhaka should be appointed for the vacant place." The object was apparently to give a preferential right to the trusteeship to the families out of which the trustees were selected

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in the year 1843, but this provision was promptly rescinded by the agreement of 1876 (Exhibit O). Clause 3 of Exhibit O states that the provision was contrary to the rights of the parties and it expressly provides that the right to be appointed was equally common to all.

The documents above referred to prove beyond all doubt that Kumara Thathachar, Sudarsana Thathachar and the 1st defendant, Krishnaswami Thathachar, have all deliberately chosen to recognise the right of the members of the Thathachar family to appoint trustees by election and the two latter have repeatedly admitted that their right to hold the office was derived from their appointment by members of the family. It may possibly be that the original intention of the Government was to appoint Kumara Tathachariar alone as the sole trustee, although the appointment was made in response to his application made on behalf of himself and the members of the Thathachar families. But it is impossible to hold that the first defendant or defendants Nos. 5 to 8 can at this distance of time go beyond the arrangements entered into deliberately by 3 members of the family in succession. In *Neelakandan* v. *Padmanabha*[1] this Court held that, where the joint right of one of the parties to the suit in that case had been admitted for a long time by the other party, the latter could not be permitted to set up rights contrary to the tenor of the admission. The Privy Council took the same view on appeal, I. L. R. 18 Mad. p. 1. Reliance was placed on behalf of the defendants Nos. 5 to 8 on the decision of this court in *Subbarayudu* v. *Kotayya*.[2] In that case it was merely held that the alleged renunciation by the real trustee in favour of a stranger was a nominal transaction and was not given effect to in practice. Moreover assuming that Kumara Thathachariar obtained the exclusive right to the office of trustee under the appointment of Government, that right must now be held to be barred by limitation. The office has been held jointly by 3 trustees or 5 trustees under appointments by the Thathachar family for a period of about 65 years. After the death of Kumara Thathachar, his son, Sudarsana, and the 1st defendant held their office professedly in virtue of their appointment by the Thathachar family. The character of their possession must determine the right which they are entitled to, and any right which the family previously had must be taken to have been surrendered and barred. It has now been fully established that a right to the office of trustee may be barred by limitation and an exclusive right to hold it singly may be equally barred. See *Vasudeva Padhi Khadang Garu* v. *Maguni Devan Bakshi Maha-*

1. (1890) I. L. R. 14 M. 153.
2. (1892) I. L. R. 15 M. p 389.

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patrulu Garu[1]. In *Secretary of State for India in Council* v. *Krishnmoni Gupta*,[2] the Judicial Committee of the Privy Council held that, if a person who is in reality the owner of a certain land, acknowledges the title of another and holds it as the tenant of the latter for the statutory period, his title to the land would be extinguished. In *Ramanathan Chetty* v. *Murugappa Chetty*,[3] this Court held that, when a branch of family which was entitled to hold the trusteeship of a temple with another branch by turns, was kept out of possession of the office by the other branch for more than the statutory period, its right to the office would be barred, although the members of the other branch holding, the office adversely might not be the same during the whole period. According to Article 124 of the Limitation Act, the right of a hereditary trustee would be barred when the office has been held adversely for a period of more than 12 years by the defendant. According to his Article, no doubt, 12 years' continuous possession by the defendant would be necessary to bar the right to the trusteeship. If the possession has been in the hands of independent trespassers, it would not be regarded as continuous possession on the part of the defendant. See Banning on Limitation, page 87 and *Gossiain Das Chunder* v. *Issur Chunder Nath.*[4] It is contended that as different persons have been holding the office of trustee along with the 1st defendant, the adverse possession of the other trustees cannot be regarded as continuous. But all of them have been holding under appointments made by the Thathachars: their title has been derived from the same source, and this, in our opinion, is sufficient to justify us in holding that the possession has been continuous and that each succeeding trustee derived his right through his predecessor when he was appointed to the vacancy caused by his death. It is also argued that, as Kumara Thathachar, Sudarsana and the 1st defendant have always been in possession of the office and have never been excluded therefrom, their sole title to it cannot be barred as each trustee must be regarded as in possession of the whole office. But the co-trustees have equally been possession of the whole office; their possession was not subordinate to the right of the 1st defendant's family nor was it had permissively under them. They were as much in possession in their own right as the members of the 1st defendant's family themselves. We must therefore hold that neither the 1st defendant nor any of the members of his family can now claim any exclusive right to the office of trustee. We have been asked to provide, in the scheme to be framed by this court, for the appoint-

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1. (1901) I. L. R. 24 M. 387.
2. (1902) I. L. R. 29 A. 104.
3. (1903) I. L. R. 27 M. 192.
4. I. L. R. 3 C. 224.

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ment always of a member of the 1st defendant's family, on the ground that it was on Kumara Thathachariar that the Government really intended to confer the office of trustee; but we are not prepared to accede to this request. The title of the family, if any, has been extinguished. It is not an ancient title, but one derived, if at all, only under the appointment of the Government in 1842. We are averse to the creation of any hereditary right to the office of a public trustee, as we do not think that such a course would be in the interests of the institution.

The next question for consideration is whether any additional trustees should be appointed. From 1872 there have been 5 trustees appointed by the members of the Thathachar family. The appointment of a Tengalai as trustee is not likely to promote harmony in the management of the temple. One or two Thengalai trustees will not be likely to control the actions of the Vadagalai trustees, while it might lead to constant opposition and quarrels and mutual recrimination. We are also of opinion that it is not desirable to appoint as a trustee any of the Sthalathars, as they are all servants of the institution. It is argued that the Thathachars also are holders of some of the offices in the temple. But that is no reason why we should appoint other people whose position with respect to the temple being merely that of servants makes their appointment undesirable. We have therefore decided not to appoint additional trustees either from amongst Thengalais or the Sthalathars. We shall presently consider the desirability of appointing one or more persons to control the trustees in the discharge of their duties in order to protect the rights of the Thengalais and Sthalathars. In the view we take of the case it is not necessary to decide whether we have power to appoint additional trustees; but we may observe that we are inclined to hold that the Court has the power to do so. The question was really decided in *Prayag Doss Ji Varu Mahant* v. *Tirumala Srirangacharlu Varu.*[1]. The Privy Council, on appeal[2] did not express any dissent from the conclusion arrived at by this court. It was contended that Section 539 of the old Code followed the provisions of Lord Romily's Act in England and under that Act it was held that the court had no power to appoint additional trustees; but, as pointed out in *Tirupati* Case[1] the procedure under the English Act was by petition and of a summary character. Section 539 of the Civil Procedure Code was enacted after the Trustee Act had been passed in England, and, according to that Act, the court undoubtedly had the

1. (1905) I. L. R. 28 M. 319. 2. (1907) I. L. R. 30 M. 138.

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power to appoint new trustees, and we agree with the learned Judges who decided the *Tripati* Case that the Indian Courts possess the same power. Besides, the Court of Chancery had, independent of any statute the power to appoint new trustees. See Halsbury's Laws of England Vol. IV, page 265. See also *Re. Burnham National Schools*[1] and *Re. Browne's Hospital, Stamford*[2]. The Indian Courts have also exercised the same extensive powers in the matter of charities as the Chancery Court in England. This Court appointed new trustees in *Krishnayya* v. *Subbayya*.[3] See also *Kaleswara Gurukkal* v. *Nataraj Tambiran*.[4] The Bombay High Court in *Annaji* v. *Narayan*[5] appointed a committee of control to supervise the action of the trustees. Besides, the present suit was tried after the new Act came into force, and Section 92 of the Act, which was enacted in the place of Section 539 of the repealed code, has made a change in the language of the old statute and makes it clear that the court has power to appoint new trustees. The suit was no doubt instituted while the old Code was in force but we are of opinion the power of the Court must be regulated by the Code in force at the time when the case was decided. We are also of opinion that the absence of a specific sanction by the Collector of a prayer for the appointment of new trustees is not fatal to the court's exercise of the power. The court in settling a scheme has very wide powers (See Tudor's Charitable Trusts page 596) and we should be inclined to hold that, if we were of opinion that a satisfactory scheme would require the appointment of new trustees, we would have the power to appoint them. If there were no prayer for the settlement of the scheme, then no doubt the sanction of the Collector would be required by the plaintiffs for asking the court to appoint new trustees; but we do not think that the absence of specific sanction would restrict the power of the court to direct the appointment of new trustees as part of the scheme which it thinks should be settled. Neither *Syed Hussain Miyan* v. *Collector of Kaira*[6] nor *Srinivasa* v. *Venkata*[7] helps the contrary contention. The latter case was one under the Religious Endowments Act and the former case decided that when sanction was not obtained for a suit for an account, the court could not pass a decree for an account. Such a decree would not come within the purview of any scheme to be settled by the court. It is, however, unnecessary to decide this point definitely.

1. (1873) L. R. 17 Eq. 241 at 246.
2. 60 L. T. 288.
3. (1911) 21 M. L. J. 784.
4. (1909) 19 M. L. J. 772 at p. 777
5. (1896) I. L. R. 21 B. 556.
6. (1895) I. L. R. 21 B. 250.
7. (1887) I. L. R. 11 M. 148.

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We are, however, of opinion that, having regard to the past management of the temple, it is desirable to provide some authorities to supervise the administration by the trustees. Several members of the Thengalai community hold offices in the temple, and the Thengalais, as a body, have important interests connected with it. It has been decided that the invocation before the recitation of the Prabandham or Tiruvaimozhi in the temple should be addressed to the Thengalai Saint Manavala Mahamuni. The Tengalais possess the right to the Adhyapakam Office. These rights led to long litigation between the Thengalai and Vadagalai communtites (See *Krishnaswami Tathachar v. Krishnamachar.*[1] There is a shrine of Manavalamahamuni within the precincts of the temple as well as a shrine of Nathamuni, the former of which is admittedly a Thengalai shrine and the latter is also claimed by the Thengalais as their shrine. The Thengalais own the right to good proportion of the Thirtham offices. Many of the namams in the temple are also Thengalai namams. The Thengalais have also the right of Asirvatham and a Thengalai is entitled to the office of Mulji Dharmakarta. All these have led to constant disputes and litigation between the communities and it is complained with reason that the fact that all the trustees are Vadagalais has tended to impede the vindication of the rights of the Thengalais and the Thengalai office holders. Exhibits XXVII, XXVII-A, XXVIII and XXXIX series relate to the question of namams. See also *Krishnaswami Iyengar* v. *Samaram Srirangachariar*,[2] Exhibits XXII and XXII-A and XXIII relate to the Thirtham; Exhibit XXIV to the right of Asirvatham: Exhibits XIX and XIX-A to the office of Mulji Dharmakarta. It is also urged that the Thathachar Dharmakartas have repeatedly attempted to introduce innovations contrary to the interests of the Thengalais. They attempted to introduce an idol of Thathachar but the attempt failed; see Exhibit XXX series. They refused the honour of Sadagopam to the Thengalai reciters of the Prabandams: See Exhibits XXVI and XXVI-A. The documents filed in the case clearly show that there is bitter enmity between the members of the Thengalai and Vadagalai communities in the place and each community has manifested a most reprehensible amount of unwillingness to recognise the just claims of the other commnnity and of office holders belonging to it. We have therefore considered it desirable in appointing a Board of supervision to provide that one of the members of the Board should be a Thengalai gentleman not holding any office in the temple. We have not considered it proper to include any Sthalathar in the Board. This is impossible on account of their position as servants of the

1. (1882) I. L. R. 5 M. 313. 2. (1906) I. L. R. 30 M. 158.

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temple. The desirability of appointing a Board of supervision is shown by the past history of the institution. The Thathachar family has itself felt the necessity of appointing outsiders to prevent quarrels amongst the trustees and to supervise their management. Although we have abstained, with the consent of the parties, from deciding the question whether the various acts of misconduct with which the trustees have been charged in this case have been proved, there can be no doubt that the history of the temple is one of incapacity, indifference and disharmony amongst the trustees. They have exhibited an amount of incompetence to deal with the servants of the temple, which renders the supervision of outsiders highly desirable. The appointment of middlemen or arbitrators by the Thathachars themselves from the year 1857 has not been attended with success. We have therefore come to the conclusion that there should be a Board of supervision consisting of 3 persons to be appointed by the District Court and that one of them should be a Thengalai, one a Vadagalai not belonging to the families of the Thathachars, and one not belonging to either of these sects, namely, a Smartha or a Madhwa. We are also of opinion that the joint participation by all the trustees in every detail of the administration will, if continued, be a fruitful source of confusion and mismanagement. We have, therefore, decided that, while all the five trustees to be appointed by the Thathachars should continue to take part in and be responsible for all important acts of administration, one individual amongst them at a time should be made responsible for the performance of all routine acts. The scheme that we have framed after full discussion and consideration is appended hereto.

The costs of the plaintiff will come out of the temple property both in this court and in the lower Court, as also the costs of the trustees, one set. The other parties including the 9th defendant will bear their own costs in this court. C. M. A. No. 59 of 1911 and C. M. P. No. 1188 of 1911 will stand over till September 1912. The appeal will be posted again in August for the appointment by this court of the first Board of supervision.

THE SCHEME.

1. *Definitions*:—

'Court':—The word 'Court' in these regulations shall mean the District Court of Chingleput, unless there be a Subordinate Court having jurisdiction over the temple under Section 92 of the Civil Procedure Code, in which case, it shall mean such court.

'Board':—The word 'Board' shall mean the Board of supervision constituted under these regulations.

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2. The expression Sri Devarajaswamy Devastanam (hereinafter referred to as the Devastanam) shall mean and include the shrine of Sri Devarajaswamy at Little Conjeevaram and all the subordinate shrines attached thereto.

3. No one shall be eligible to be a trustee of the said Devastanam :—

(*a*) who is not a lineal male descendant of Conjeevaram Koti Kanyakadanam Sri Thathadesikar,

(*b*) who is under 25 or over 60 years of age,

(*c*) who does not permanently reside at Conjeeveram or at any place within fifty miles thereof, or who does not undertake to reside at such place during the period of his tenure of office as trustee,

(*d*) who has been convicted of any offence involving moral turpitude, or against whom any order under Section 109 or 110 of the Criminal Procedure Code has been passed,

(*e*) who is an uncertificated bankrupt or undischarged insolvent,

(*f*) who is suffering from unsoundness of mind, total blindness, total deafness, dumbness, advanced leprosy, or paralysis of such a nature as unfits him for work, or

(*g*) who is a member of a joint family of which some other member is at the time a trustee.

4. There shall be five trustees for the said Devastanam.

5. Three of the trustees shall be members of the Eastern Branch and two of the Western Branch of the family of Koti Kanyakadanam Sri Thathadesikar.

6. All questions regarding the eligibility of any person to be a trustee shall be decided by the Board of Supervision hereinafter referred to.

7. Not more than one member of a joint Hindu family shall stand as a candidate for the office of trustee at the same time.

8. A trustee shall hold office for five years from the date of his appointment but shall be eligible for re-appointment.

9. The trustees shall be elected by the lineal male descendants of the said Koti Kanyakadanam Sri Thathadesikar who are of over 18 years of age and in accordance with rules to be framed for the purpose.

10. On the occurrence of a vacancy, it shall be the duty of the lineal male descendants of the said Koti Kanyakadanam Sri Thathadesikar to elect a trustee to the said vacancy, within three months of the vacancy, in accordance with the rules to be hereunder framed.

In default of the said persons so to elect, the Board of supervision shall appoint to the said vacancy a proper person to be a trustee within one month thereafter. Failing both, any trustee or member of the Board of supervision or any two worshippers may apply by petition to the court to appoint a competent person to fill the vacant office.

11. (i) If any trustee should, during the continuance of his trusteeship become at any time disqualified to be a trustee within the meaning of Regulation 3, he shall cease to be a trustee.

(ii) An executive trustee, who, in the opinion of the Board, has absented himself without lawful excuse from duty continuously for a period of one month, shall cease to be executive trustee on receiving intimation to that effect from the Board.

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(iii) A non-executive trustee, who, in the opinion of the Board, has absented himself from duty for a period of six months, shall cease to be a trustee on receiving intimation to that effect from the Board.

12. Any trustee intending to resign office shall give notice of such intention to the Board not less than one month previous to the date from which he intends the resignation to take effect, and, on the expiration of such date, he shall cease to be trustee.

The same rule shall apply to the executive trustee intending to resign the office of executive trustee only.

13. Any two worshippers, after obtaining the consent in writing of the Advocate-General of Madras or of the Collector of the District, or two members of the Board may apply to the court for the removal of any trustee from office, and, thereupon, it shall be competent to the said court to suspend such trustee pending enquiry and, after giving notice to such trustee and to such other persons as it may consider necessary and after making due enquiry, to remove the trustee from office.

The court shall, instead of dismissing him, have also power to suspend from office any trustee for a period not exceeding six months.

14. Except as hereinafter provided, the office of executive trusteeship shall be held for one fasli year by every trustee in rotation in the order of seniority with reference to the date of appointment.

In the case of trustees appointed on the same date, the senior in age shall have precedence for the purposes of this Regulation.

Any trustee appointed as executive trustee during the currency of a fasli shall be entitled to hold the office till the end of the fasli without prejudice to his right to succeed to the office by rotation.

15. No one shall be executive trustee if his appointment is objected to by three of the other trustees and their objection is upheld by the Board.

16. The name of the rotation executive trustee for any particular fasli shall be announced on or before the 31st May preceding; any objection to the appointment of any trustee as executive trustee shall be made and decided before his appointment is announced.

17. The executive trustee shall, subject to the provisions and restrictions herein contained and the rules framed under this scheme, manage the affairs of the said Devastanam on behalf of the trustees.

18. The executive trustee shall make all expenditure according to the budget allotments or as may be sanctioned frome time to time as hereinafter provided.

19. The executive trustee shall have the power to sanction and carry out any urgent repairs involving an expenditure of not more than Rs. 100 during the year without the previous sanction of the other trustees.

20. The executive trustee shall have in his charge one of the keys of the jewel rooms and of any other rooms, places or boxes in which valuable articles of the Devastanam are, or may be, stored or kept, and of the *Abhisheka Mantapam* and of the shrines of *Devarajaswamy and Thayar.*

21. The executive trustee shall have the power to suspend any holder of a mirasi office in the Devastanam for a period not exceeding three days.

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22. The executive trustee shall be bound to furnish to the other trustees all reasonable information and facilities for inspection of account books, records &c., and property of the Devastanam.

23. Subject to the provisions herein contained and the rules that may be framed from time to time under this scheme, the trustees shall transact all business and determine all questions by resolution to be passed either at the meetings of the trustees or in circulation.

Any subject that is required by two trustees to be considered at a meeting shall not be disposed of in circulation.

24. The decision in any matter shall be according to the majority of the votes of the trustees and, in case of equality of votes, the opinion of the executive trustee, or in the case of a matter decided at a meeting from which he is absent, the opinion of the presiding trustee, shall prevail.

25. The trustees shall on or before the 31st March every year prepare a budget for the following year and submit the same to the Board.

In the preparation of the Budget, the trustees shall have due regard to the custom and usage of the institution.

26. The Board shall have power to modify the budget in such manner as it may think proper.

One copy of the budget as finally settled shall be left in the Devastanam office in the custody of the trustees and another copy shall be sent by the executive trustee for the time being to the court and another to the Board and another copy shall be kept for inspection by the worshippers at the Devastanam office at all reasonable times.

27. The trustees shall have the power to sanction expenditure during any fasli up to a sum of Rs. 1,000 over and above the budget allotments. In every case in which any amount is so sanctioned beyond the budget allotment, the resolution of the trustees sanctioning the same shall contain the reasons for such special sanction being made and copies of such resolution shall be communicated by the executive trustee under his signature to the Board.

The Board shall have power to disallow any such expenditure which may, in its opinion, be improper, and in such case the trustees shall refund the amount to the Devastanam Treasurer.

28. The trustees shall have power to grant leases of immoveable property of the Devastanam on proper terms for a period not exceeding three years ; the trustees may grant a lease for more than 3 years but not exceeding 21 years with the previous sanction of the Board.

29. The trustees shall not sell or mortgage immoveable property of the Devastanam without the previous sanction of the court to be obtained on petition after notice to the Board.

30. The trustees shall, with the approval of the Board, have the power to sell, if necessary, the jewels or other moveable property belonging to the Devastanam.

The treasurer shall be present at any such sales by the trustees.

31. All suits relating to the Devastanam shall be instituted or defended in the name of the trustees, but the executive trustee shall have the conduct of such suits.

32. The trustees shall have power to suspend or dismiss the servant of he Devastanam ; but when the holder of any mirasi office in the Devastanam is

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suspended for a period of over two months or dismissed it shall be subject to the approval of the Board.

33. Any holder of such mirasi office in the Devastanam who is suspended for a period not exceeding two months, shall have a right of appeal in the matter to the Board, provided always that such order of suspension passed against him shall take effect in the meanwhile and the appeal to the Board shall be entertained only in case the appellant has previously obeyed the order of the trustees.

The Board may suspend the order pending the decision of the appeal.

Treasurer.

34. There shall be a treasurer for the Devastanam on a monthly salary of not less than Rs. 75-0-0 and not more than Rs. 100-0-0.

35. The treasurer shall be appointed by the court. Any caste Hindu entitled to worship in the temple is eligible to be appointed to the office of the treasurer, provided he is not a lineal male descendant of the family of Sri Thathadesikar or an office holder in the Devasthanam.

36. The treasurer shall hold office for five years from the date of his appointment but shall be eligible for re-appointment.

37. The treasurer shall, before taking charge of the office, deposit in the court as security for the due discharge of the duties of his office, Government promissory notes of the face value of Rs. 2,500.

38. All rents, offerings, presents and other incomes whatsoever of the Devastanam received by or on behalf of the trustees, shall be paid to the treasurer on his receipt.

This rule shall not apply to any offerings or presents which any mirasi officer of the temple is entitled by custom to receive for his own benefit.

39. The treasurer shall also make payments for all proper disbursements.

40. The treasurer shall be in charge, apart from the keys that may be held by the executive trustee or any mirasi office holder, of one of the keys of the jewel rooms and other rooms and places (other than shrines) and boxes in which articles of value belonging to the Devastanam are, or may be, stored or kept.

41. The treasurer shall be responsible for the proper maintenance of accounts in the Devastanam. The treasurer shall be bound to allow inspection of the Devastanam by the trustees or by the members of the Board at all reasonable times.

42. The treasurer shall not keep with him in the temple treasury more than Rs. 2,000 in cash. All amounts over and above the said amount of Rs. 2,000 shall be deposited in the Bank of Madras or in any such other Bank as may be approved of by the court.

43. The treasurer shall not absent himself without previously obtaining leave from the trustees.

44. Whenever the treasurer has to absent himself for a period not longer than one month, he may make arrangement for the due discharge of the duties of his office on his own responsibility.

45. Whenever the treasurer has to absent himself for a period longer than one month, he shall report the same to the court, and thereupon the court shall make such arrangements for permitting him to be on leave and for the due discharge of his duties during the period of his absence, as it may think fit.

46. If the treasurer, in a case of sudden emergency, remains absent without making any arrangement for the due discharge of the duties of his office on

his own responsibility, the trustees may appoint one of the non-executive trustees to take charge of the office temporarily, pending the order of the court.

47. Whenever the office of the treasurer falls vacant, any of the trustees or any member of the Board may apply to the court by petition for filling up the vacancy.

If no such application is made for one month after the occurrence of the vacancy, any worshipper shall be entitled to make such application. The court shall also be entitled to make appointment to the vacancy during his absence on such terms as to security as it might think fit.

48. Any trustee or member of the Board or any two worshippers may apply to the District Court for the removal or suspension of the treasurer, and the court in its discretion may fine, suspend or dismiss tde treasurer.

Board of Supervision.

49. There shall be a Board of supervision for the Devastanam.

50. The Board shall consist of three members:—one Vadagalai Vaishnava who is not a member of the Thathachari family, one Thengalai Vaishanava and one Smartha or Madhwa.

51. No office holder of the temple shall be a member of the Board. The holding of *Adhyapaka miras* office alone shall not of itself be a disqualification under this clause for being a member of the Board of supervision.

52. The court in making appointment to the Board will be careful in selecting men who by their character, position, education and ability command the confidence of the Hindu community.

The first members of the Board shall be appointed by this court.

53. The members of the Board shall hold office each for five years, but shall be eligible for re-appointment.

54. The opinion of the Board shall be determined by the majority of its members.

55. The Board, shall before the commencement of every fasli, appoint one of the non-executive trustees concurrent auditor for the following fasli.

It shall be the duty of the person so appointed to carry out the concurrent audit every month dnring the fasli.

56. The Board shall also, on or before the 31st May of every year, appoint an annual auditor who shall be a qualified accountant, on such remuneration as it thinks fit to be paid out of the Devastanam funds, for the purpose of auditing the accounts of the Devastanam and preparing and submitting an abstract of accounts and a balance sheet of receipts and disbursements for the fasli ending the 30th June following.

57. The report of the auditor, together with balance sheet and the abstract of accounts shall be submitted to the Board on or before the 30th of September and a copy of the same shall also be forwarded to the court. The accounts of each fasli, together with the report of the auditor and the abstract of the accounts and the balance sheet, shall be exhibited at the Devastanam office from the 15th October to 15th November following, and all worshippers of the temple shall be entitled to inspect the same at all reasonable times.

58. The Board shall be entitled to call for any information from the trustees, the executive trustee or the treasurer.

59. The Board of supervision may employ a clerk on a salary of not more than Rs. 20.

Veeraraghava Thatha Chariar. v. Srinivasa Thatha Chariar.

60. The members of the Board shall be entitled to first class travelling allowance and batta according to the scale applicable to Government servants, provided that not more than one first class railway fare to and fro shall be drawn for each journey and provided that the total allowance to a member shall not exceed Rs. 60 in the year.

61. Any two worshippers, with the sanction of the Advocate-General or the Collector of Chingleput, may apply by petition to the court for the removal of any member of the Board from office. The court may thereupon after such notice to him and such other persons as it may deem necessary and after due enquiry, for sufficient reasons, order the removal of such member.

62. Any mirasi holder or servant, between whom and the trustees there is any dispute regarding his right or emoluments, may submit the question to the decision of the Board on condition that he agrees to be bound by such decision. In such cases the Board shall have power, after notice to the trustees, to decide the question submitted to them and any decision passed by them, shall be binding on both parties.

63. Any two worhippers, with the sanction of the Advocate-General or the Collector of Chingleput or the Board or the trustees may apply to the High Court of Judicature at Madras by petition for application of surplus funds of Devastanam for founding and maintaining a school for the training of the archakas or for imparting religious instruction or for the formation of a library or for such other purposes as the High Court may approve.

64. The Court shall, subject to the control of the High Court, make rules, not inconsistent with any provisions herein contained.

(*a*) for the election of trustees and filling up of vacancies,

(*b*) for the management of the Devastanam,

(*c*) for preventing maladministration and misappropriation of temple funds,

(*d*) for the conduct of business by the trustees and the Board and worship in the temples,

(*e*) for the framing of the budget,

(*f*) for the keeping, taking and the maintenance of the stock list and accounts,

(*g*) for the sale of jewels or other moveable property belonging to the Devastanam, and,

(*h*) for all such other matters as may be necessary for the proper management of the affairs of the temple, in accordance with this scheme.

The court may also, from time to time, modify any such rules made by it, subject, as aforesaid, to the control of the High Court.

65. Any two worshippers, with the sanction of the Advocate-General or the Collector of the District, or the parties hereto, or the trustees, or the Board, may, by petition, apply to the High Court for such further or other directions in the matter as may be necessary or for modification of this scheme or any of the provisions thereof.

Transitory.

66. This scheme shall come into force on the 1st September 1912, and all the present trustees shall vacate office on that date.

The first trustees under these regulations shall be appointed by the District Court of Chingleput.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Mr. Justice Sankaran Nair, and Mr. Justice Ayling.

V. Srinivasa Varadachariar ... *Appellant in all.* (*Plaintiff in all*).

v.

Sami Reddi and others { *Respondent in S. A. Nos. 292 to 299 of 1910.* } (*Defendant*).

Landlord and tenant—Co-sharers—Suit for proportionate rent—Contract to pay proportionate rent—Legality.

A joint owner is not entitled to sue for proportionate rent. But if parties agree to accept and pay proportionate rent according to shares, there is nothing illegal in it, though it is a question whether stranger co-shares will be bound by the agreement between other sharers and the tenants.

Srinivasa Varadachariar *v.* Sami Reddy.

Second Appeals from the decrees of the District Court of Chingleput in Appeal Suits Nos. 86 to 92 and 94 of 1909, presented against the decisions of the Court of the Head Assistant Collector of Chingleput in Summary Suits Nos. 407 to 413 and 415 of 1908, respectively.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellant.

Respondents unrepresented.

The Court delivered the following

Judgment:—The plaintiff, the owner of $5\frac{1}{1}\frac{5}{8}$th share in the shrotriem, sues to enforce acceptance of pattas. As he is only a joint owner he is not entitled to sue for proportionate rent. This question has already been decided by this Court. See C. M. A. No. 125 of 1907 on the file of this Court.

But it is contended that the plaintiff had already sued and obtained decrees for enforcement of pattas for his $5\frac{1}{8}$th share for fasli 1315 and as the defendants had executed muchilikas for Faslies 1315 and 1316 the plaintiff's right to enforce pattas for his $5\frac{1}{8}$th share should therefore be declared in this suit.

As to the pattas of the Fasli 1315, it is contended by the Advocate-General that they were executed in pursuance of the decree, and there is no *res judicata* as the decision with reference to the patta for Fasli 1315 was on a pure question of law.

Assuming this to be so, we do not see why the agreement between the parties to pay proportionate rent for the plaintiff's $5\frac{1}{8}$th share evidenced by the execution of pattas and muchilikas for fasli 1316 should not be enforced.

Whether such agreement is binding on the other co-owner is not a question now for consideration, as he is not a party to this

S. A. Nos. 292 to 299 of 1910. 26th April 1912.

Srinivasa Varadachariar v. Sami Reddy.

suit. We see nothing illegal in the agreement. We must therefore set aside the decrees of the courts below and declare that the plaintiff is entitled to tender a patta for his $5\frac{1}{8}$th share.

As the plaintiff brought a suit to enforce his claim with reference to his $5\frac{1}{1}\frac{5}{6}$th share, and this question does not appear to have been raised in the lower courts, we direct each party to bear his own costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Narayana Pillai ... ... *Appellant.* (*Plaintiff*).

v.

The Secretary of State for India, in Council, represented by the Collector of Tanjore. } *Respondent* (*Defendant.*)

Narayana Pillai v. Secretary of State.

Madras Act III of 1905—"Aggrieved"—Limitation Act, Art. 149—Proof of possession—Presumption—Injunction.

When possession for a certain period is shown it will be open to a court deciding the facts to presume that possession prior to that period was also in the party whose subsequent possession is proved. *Venkatarama Aiyar* v. *Secretary of State*[1] referred to.

Where a party proves his possession for thirty years prior to suit the presumption to be drawn is that he had prescribed title by possession for sixty years unless it be proved on behalf of Government that the land was unoccupied land or land in the occupation of Government before.

A mere notice, by Government in exercise of its powers under Act III of 1905 (Madras) cannot be regarded as a proceeding under the Act by which a person can be "aggrieved" within the meaning of S. 14 of Act III of 1905.

Held also that it was not necessary to grant an injunction against Government and that it would be enough to declare plaintiff's title to the land in respect of which the injunction is sought for.

Second Appeal from the decree of the District Court of Tanjore in Appeal Suits Nos. 884 and 886 of 1909, presented against the decree of the Court of the District Munsif of Tiruvalur in Original Suit No. 345 of 1908.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellant.

The Government Pleader for respondent.

This second appeal first came on for hearing before *Sundara Aiyar, Spencer* JJ. who delivered the following

Judgment:— It is not quite clear from the judgment of the learned District Judge whether he considered the question whether

S. A. No, 1756 of 1910. 22nd April 1912.

1. (1910) I. L. R. 33 M. 362.

Narayana Pillai v. Secretary of State.

the plaintiff's predecessors in title were in possession of the two links of the pial in dispute before the plaintiff obtained his conveyance. The District Judge observes that the plaintiff's possession was proved to date only from 1906. He says also : " plaintiff's possession is evidently not such as to throw the burden of proof on the other side" *i. e.*, apparently, that possession for 2 years is not sufficient to shift the onus.

We may also observe that, when possession for a certain period is shown, it will be open to a court deciding the facts to presume that possession prior to that period was also in the party whose subsequent possession is proved. See *Venkatarama Iyer* v. *The Secretary of State for India, in Council.*[1]

We request the lower appellate Court to record a revised finding on the evidence on record on the question of possession of the two links of the pial and the seven links of the brick *alodi*. He will also record a finding on the 2nd issue. The findings will be submitted within one month from the date of the receipt of this order. Seven days will be allowed for objections.

[In compliance with the order contained in the above judgment the District Judge of Tanjore submitted the following findings :—Ed.]

" My finding on the question of possession, therefore, is that the plaintiff and his predecessors-in-title have been in possession of the 2 links of pial and the 7 links of alodi for a period of 30 years and more.

As regards the question of limitation, I think the suit is clearly time-barred by section 14 of Act III of 1905 (Madras). The suit is not one for a declaration of title to the disputed site, but one for an injunction restraining the defendant from interfering with the plaintiff's possession of the site by taking action against him under Act III of 1905 and for the recovery of the penal assessment already levied from him under that Act. Both these causes of action clearly come within the scope of section 14 of Act III of 05, and are governed by the rule of limitation therein laid down. In the plaint the plaintiff himself has given the dates of his causes of action as 27th November 1907, the date on which the defendant served him with notice to vacate the disputed sites, and 18th January 1908, the date on which penal assessment was collected from him in respect of the alleged encroachment. Clearly those are the dates on which the two causes of action arose, and the plaintiffs' suit was therefore time-barred in respect of both the reliefs prayed for by him on the date on which he presented his plaint to the District Munsiff's Court, *i.e.*, 28—9—01. My finding on the second issue is therefore that the suit is barred by limitation."

1. (1910) I. L. R. 33 M 362.

Narayana Pillai v. Secretary of State.

The Court delivered the following

Judgment:—The finding of the lower appellate Court is that the plaintiff and his predecessors-in-title have been in possession of the plaint lands for more than thirty years prior to the suit. The presumption, therefore, is that he was in possession prior to that time also, unless it be proved on behalf of Government that the land was unoccupied land or land in the occupation of Government before. The plaintiff's title, therefore, must be held to be established.

Then the next question is whether the suit is barred by limitation. The District Judge holds that it is barred under Section 14 of Act III of 1905. That section while entitling persons deeming themselves aggrieved by any proceeding under the Act, to apply to the Civil Court for redress, provides that the Civil Courts shall not take cognisance of any suit instituted by such persons for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose. Then the explanation to this section states that in respect of any assessment or penalty levied by Government the cause of action shall be deemed to have arisen on the date on which such assessment or penalty was levied and in respect of eviction or forfeiture on the date of eviction or forfeiture. The proceedings which the Government is entitled to take *suo moto* under the Act against persons who in its opinion are in unauthorised occupation of land, are either the levying of penal assessment or summary eviction of the persons in occupation. Hence the statement in Section 14 that the cause of action arises when a party deems himself aggrieved by either of these steps taken by Government. A mere preliminary notice given by Government before exercising these powers under the Act cannot be regarded as a proceeding under it by which a person is 'aggrieved'. The notice itself is no grievance. The result of the enquiry made by Government on the notice may be to recognize the title of person to whom it is issued. The party has a grievance only when his claim to the land is not recognised by Government and steps are taken by it either to evict him or to levy penal assessment.

In this case the plaintiff's suit, so far as it seeks to recover the assessment levied by Government, must be held to be barred; in so far as the claim to the injunction is concerned, Section 14 is inapplicable for the reasons already given. As against the Government, we consider it unnecessary to give an injunction. It will be enough to declare the plaintiff's title to the land with respect to which the injunction is sought. In the circumstances there will be no order as to costs in any of the Courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Wallis.

Thachoor Poonkuzhi Illath Kesavan Unni (Minor) by his guardian, Head Clerk of the District Munsif's Court, Manjeri } *Appellant. (5th Defendant.)*

v.

E. F. Nicholas, and others } *Respondents. (Plaintiff and defendants Nos. 1 to 4 and 6.)*

Malabar Law—Nambudris—Affiliation by members of one illom of member of another illom—Validity—Family arrangement.

Kasavan Unni v. Nicholas.

According to the usage amongst Nambudris the members of an illom consisting of one male and two female members may validly affiliate another by requiring a member of another illom to marry and beget issue for the first illom; and female issue born of such marriage would be validly affiliated as members of the first illom.

Held also that a family arrangement in the nature of a partition between the members of an illom and the affiliated member was binding on the members to the arrangement.

A member who is born subsequent to the arrangement is not entitled to question it.

Second Appeal from the decree of the Subordinate Judge's Court of South Malabar at Calicut in Appeal Suits Nos. 581 and 609 of 1908, presented against the decree of the Court of the District Munsif of Manjeri in Original Suit No. 301 of 1907.

C. V. Anantakrishna Aiyar for appellant.

J. L. Rozario for respondents.

These Second Appeals first came on for hearing before *Wallis* and *Krishnaswami Aiyar*, JJ. who delivered the following

Judgment:—There were three members in the Tachoor Poonkuzhi Illom, Narayanan and two women. They executed Exhibit IV in favour of one Damodaran whereby they constituted Damodaran their heir and stipulated that Damodaran should marry and beget issue for their illom, to succeed to the Tachoor Poonkuzhi Illom on the death of Narayanan. Damodaran married accordingly and the 6th defendant, a female child, was born as the result of the union. Narayanan's wife having subsequently given birth to a male child there were differences amongst the parties and a release was executed in Narayanan's favour by Damodaran on his own behalf and on behalf of the minor 6th defendant and by his wife whereby they

S. A. Nos. 382 and 383 of 1909. S. A. No. 382 of 1909.

11th April 1912

Kasavan Unni v. Nicholas.

renounced all interest in the properties of the Tachoor Poonkuzhi Illom in consideration of a sum of Rs. 18,000 partly paid and partly promised by the father of the plaintiff in this suit. The plaintiff's father who advanced this sum at the request of Narayanan obtained a mortgage from Narayanan and the two women of his illom. The mortgage is impugned as invalid and several questions are argued. But before dealing with them it is essential to know whether Exhibit IV is valid and operates to affiliate the offspring of Damodaran whether male or female. It appears to have been assumed in the Courts below that the affiliation was valid. No case has been cited to us where the question has been decided when the affiliation was made not by the sole surviving member of the illom but as here by a male member and two women. Our attention was drawn to two cases where the affiliation was made by two women but no question was there raised or decided as to the validity of such affiliation and it may be that those cases stand on a special footing as only one of the women might have been regarded as entitled to the illom property. Before disposing of the second appeal, we think it necessary to have findings on the following issues :—

(1) Whether according to the usage amongst Nambudris the members of an illom consisting of one male and two female members may validly affiliate another by requiring a member of another illom to marry and beget issue for the first illom.

(2) Whether female issue born of such marriage would be validly affiliated as members of the first illom.

Fresh evidence may be taken on both sides. The Judge should examine witnesses he may see fit to call, in addition to the evidence which the parties may adduce. The findings should be submitted within three months from this date and seven days will be allowed for filing objection to the said findings.

In compliance with the above Judgment, the Subordinate Judge submitted the following.

" My findings on the issues referred to me for trial are :—

(1) That according to the usage amongst the Nambudris the members of an Illom consisting of one male and two female members cannot validly affiliate another by requiring a member of another illom to marry and beget issue for the first Illom unless he or the lady proposed to be married to him is previously made legally an heir of the aforesaid Illom ; and

(2) That the female issue born of the marriage would be validly affiliated if the condition laid down by me in connection with the 1st issue is fulfilled.

Kesavan Unni v. Nacholas.

The Court delivered the following

Judgment:—The Subordinate Judge has now returned a fiinding on the first issue remitted to him to the effect that according to the usage amongst the Nambudris the members of an illom consisting of one male and two female members cannot validly affiliate another by requiring a member of another illom to marry and beget issue for the first illom unless he or the lady proposed to be married to him is previously made legally an heir of the aforesaid illom. It is argued for the appellant that the evidence shows that such an affiliation can legally be made independently of the condition precedent laid down by the Subordinate Judge and reliance is placed on the decision of the late Saddar Court in the case of *Totakara Allutur Mánakal Nambudripad* v. *T. M. Trivikrama Nambudripad* quoted in the case of *Vasudevan* v. *Secretary of State for India.*[1] We, however, do not think it necessary to decide the question, as, in the present case, the condition precedent has been complied with. The judgment both of the District Munsif who tried the case and of the Subordinate Judge who heard the appeals and also the order of this Court calling for a finding proceeded on the footing that all the then members of the Tachoor Poonkuzhi Illom "constituted Damodaran as their heir" by Exhibit IV. No question as to this was referred to the Subordinate Judge. Damodaran, therefore, had an interest in the property of Tachoor Poonkuzhi Illom. The issue of the marriage which he contracted for the benefit of that illom also on birth obtained an interest therein under Exhibit IV. It has been found by the Court below that at the time when Exhibit G was entered into a state of things existed in that illom which made it for the advantage of all concerned including the present appellant (6th defendant) that Damodaran and his wife and child 6th defendant, appelant in S. A. No. 383 should separate from that illom. Exhibit G was executed, no doubt, primarily to carry out the arrangement contemplated as liable to arise when Exhibit IV was executed, but it may, also, we think, be regarded as evidencing and as part of, a family arrangement in the nature of a partition entered into by all the persons who at the time of its execution had an interest in the property of the illom, either originally *i.e.*, Narayanan, his wife and widowed daughter-in-law, or by virtue of Exhibit IV, *i. e.*, Damodaran and his wife and child. It is found that full consideration was paid for the execution of Exhibit G. We do not think that there is any reason to regard Exhibit G as invalid or as not binding on the appellant (6th defendant) whose father Damodaran executed it on

1. (1887) I. L. R. 11 M. 157 at 175

Kesavan Unni *v.* Nicholas.

her behalf as well as on his own. There is also no reason for regarding Exhibit B as in any way invalid. It was executed by Damodaran and his wife and the 6th defendant as well as by Narayanan and his wife and widowed daughter-in-law. The 5th defendant (appellant in S. A. No. 382) was born long after the execution of Exhibit G, and it is not open to him to say that he is not bound by it.

We therefore dismiss both the Second Appeals with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Meda Vengamma of Gunkanapally ... *Appellant.* (*Plaintiff*).

v.

Mitta Chelamayya and others ... *Respondents.* (*Defendants*).

Hindu Law—"Woman's Estate"—Stridhan—Creation by contract or grant—Accretions, nature of.

Meda Vengamma *v.* Mitta Chelamayya.

A woman's estate can be created by contract or by grant and not merely by inheritance. A Hindu female is capable of possessing two kinds of estate passing by different rules of inheritance, namely, a woman's estate with respect to which she does not become a stock of descent and which passes after her death to her husband's heirs; and (2) an absolute estate which passes to her own heirs.

Where the husband's brother of a Hindu widow gave half of the property to his brother's widow, *held* that in the circumstances a woman's estate was created in the properties.

Quære:—Whether a mere stranger can give property to a Hindu widow with the incidents of a widow's estate descendible to her husband's heirs?

There is no presumption, especially in the absence of even an allegation in the plaint, that immoveable properties purchased by a Hindu woman out of the income of a woman's estate in her hands are incorporated with the parent estate and with the latter will descend to her husband's heirs.

Appeal from the decree of the District Court of Cuddapah, dated 16th December 1907, in O. S. No. 2 of 1907.

T. V. Seshagiri Aiyar for appellant.

S. Gopalswami Aiyangar for 1st respondent.

There were two brothers. One of them the husband of Lakshmakka the deceased widow died in 1868. Soon after through the mediation of some gentlemen the brother of the deceased entered into an agreement or family arrangement (Exhibit IV) with her by which he promised to give her *his brother's share*" "On condition of your adopting one of my sons in the event of my having sons or

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Appeal No. 73 of 1908. 1st April 1912.

Meda Vengamma v. Mitta Chelamayya.

the boy whom I choose." There was no adoption in his life-time. He had one son alive at the time of his death. Now Lakshmakka died. The plaintiff her step daughter claims the share from the defendants who is in possession as the adopted son of Lakshmakka. The 1st defendant is the son of her husband's brother. The plaintiff's contentions were: that the two brothers were divided; that even if they were not divided Lakshmakka took only a widow's estate under the said document; that on her death it passed to her husband's heirs (reversioners) namely the plaintiff. The contentions of the defendant were, that the two brothers were undivided and the whole property passed to the younger brother by survivorship that Lakshmakka got an absolute estate under the document of 1868 which she transferred to the defendant: That even if the brothers were divided and Lakshmakka got a widows' estate, the defendant was her adopted son and as such a preferable heir to plaintiff and lastly even if the brothers were undivided and the widow took only a limited estate the reversion vested in the younger brother's heirs and not in the heirs of Lakshmakka's husband.

The lower court dismissed the suit on the ground that Lakshmakka took an absolute estate, which she passed on to the defendant. The judge found that the brothers were undivided; but he did not record any finding as to adoption though he seemed to disbelieve it. Hence the appeal.

T. V. Seshagiri Iyer for the appellant:—The brothers were divided. Lakshmakka claimed a half share of the property in the right of her husband and the share which she accordingly got from her deceased husband's brother under Exhibit IV must necessarily be only a widow's estate which would pass on her death to the reversioners of her deceased husband. The plaintiff is the nearest reversioner being the daughter. The widow having preferred to hold the estate as the heir of her husband she could have no absolute right to the property. She prescribed only for a widow's estate. This is not a case of a creation of an estate by act of parties with a devolution unknown to Hindu Law. This is the case of a person prescribing for an estate well-known to Hindu Law and then the law steps in and decides the course of succession.

Even if the adoption was in time the authority to adopt contained in Ex. IV in which the deceased husband's brother promised to give his son in adoption does not give a general authority to adopt. Neither of the contingencies mentioned in Ex. IV had happened. He cited the following cases. *Sreemutty Rabutty Dossee* v. *Libchunder Mullick,*[1] *Denonath Mukkerji* v. *Gopalachurn,*[2] *Ganpat-*

1. (1854) 6 M. I. A. p. 1 at p. 17. 2. (1881) 8 C L. R. 57.

Meda Vengamma v. Mitta Chelamayya.

rao v. *Ramachandar*,[1] *Subrahmanyam Chetty* v. *Arunachellam Chetty*,[2] *Lachhan Kunwar* v. *Manorath Ram*,[3] *Amulya Charan* v. *Kalidas*,[4] *Venkataranayya* v. *Venkatalakshamma*,[5] *Bayamnaya* v. *Peddichalamnaya*.[6]

The Advocate-General for the respondent, contended that the judge was right in holding that there was no previous division. The brother gave Lakshmakka the half share of her husband in pursuance of a promise made to her. The widow under the gift, took either an absolute estate or an estate for life. In the former case the estate can be given to whomsoever she pleased to give. In the latter case the estate will not go to heirs of the deceased husband. It will go only to the heirs of the donor. In any case whether she prescribed for a life estate or a widow's estate the heirs will be the donor's heirs and not those of the husband. The following cases were referred to *Nistarini Dassi* v. *Nundo Lal Bose*,[7] *Surajmani* v. *Babinath Ojha*,[8] *Sambasiva Aiyar* v. *Venkatesavara Aiyar*,[9] *Jogeswar Narain Deo* v. *Ramachan Dutt*,[10] *Sambasiva* v. *Viswam*,[11] *Amulya Charan* v. *Kalidas*,[12] *Rai Bishen Chand* v. *Mt. Asmaide Koer*,[13] *Bhoba Tavuni* v. *Peury Lal Sangal*,[14] *Timmaji Amma* v. *Javvaji Subbaraju*.[15]

T. V. Muthukrishna Aiyar in reply quoted *Sudarsnam Mastri* v. *Narasimalu Mastri*.[16]

Judgment:—In this case the plaintiff is a daughter of one Pedda Tippayya by his first wife, and sues for the recovery of the properties mentioned in the schedules attached to the plaint. Pedda Tippayya had a brother named Chinna Tippayya, and had married a second wife, Lakshmakka, who was only about ten years old at his death. She died in February 1905. The plaintiff's case is that Pedda Tippayya and Chinna Tippayya were divided in interest, and that they effected an actual division of the moveable properties and the houses, but that the other properties remained in the joint enjoyment of both at the time of Pedda Tippayya's death in 1868. The plaint alleges that Lakshmakka, the widow of Pedda Tippayya took possession of his properties after his death in 1868 and that the 1st defendant, who joined Lakshmakka, and was looking after her

1. (1888) I. L. R. 11 A 296.
2. (1904) I. L. R. 28. M. p. 1.
3. (1894) I. L. R. 22 C. 445.
4. I. L. R. 31 M. 180.
5. (1897) I. L. R. 20 M. 493.
6. (1898) 9. M. L. J. 33.
7. (1902) I. L. R. 30 C. 369. 70.
8. (1907) I. L. R. 30 A 84.
9. (1907) I. L. R. 31 M. 179.
10. (1896) I. L. R. 23 C. 670.
11. (1907) I. L. R. 30 M. 356.
12. (1905) I. L. R. 32 C. 86.
13. (1883) I. L. R. 6 A. 560 (P. C.)
14. (1897) I. L. R. 24 C 646.
15. (1910) 20 M. L. J. 26.
16. (1901) I.L.R. 25 M. 149 at 154.

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properties took possession of them on her death in 1905, and that he is wrongfully withholding it from the plaintiff. She denies that the 1st defendant who claims to have been adopted by Lakshmakka, was really adopted by her, and that Lakshmakka had any authority to adopt him. The 2nd and the other defendants are made parties on the ground that they are in possession of some of the properties without any lawful title.

The 1st defendant contends that Pedda Tippayya and his brother Chinna Tippayya were undivided and that all the family properties devolved on Chinna Tippayya on the death of his brother, that Pedda Tippayya a few days before his death gave authority to Lakshmakka to make an adoption to him, and that Chinna Tippayya also give authority to Lakshmakka to adopt any one of his own sons execept the first in the event of his begetting sons, or otherwise any other boy. The 1st defendant further contends that Chinna Tippayya also agreed to give a half share of the properties to Lakshmakka, and that subsequently the properties were divided. He further contended that he was adopted by Lakshmakka in the year 1881, and that he had since been in enjoyment of the properties obtained in the division in his own right as of other properties acquired by him subsequently apparently out of the income of the properties obtained at the division.

Issues were framed as to the question of the status of the two brothers, as to the capacity in which Lakshmakka took a half share in the properties as to the factum and validity of the adoption of the 1st defendant, as to limitation, and as to the properties the plaintiff would be entitled to recover in case she was entitled to succeed as reversioner after the death of Lakshmakka.

The Lower Court held that the brothers were undivided in interest at the death of Pedda Tippayya, that there was no adoption in fact, and that even if there were, it was invalid as the widow Lakshmakka had no authority to adopt. It also held that Lakshmakka held the half share allotted to her at the division absolutely, its view being that Lakshmakka must be taken to have obtained it as a gift from Chinna Tippayya. We agree with the District Judge that it is not proved that there was any division between the brothers before Pedda Tippayya's death.

[Their Lordship's here discussed the evidence in support of the above conclusion. Ed.]

We have now to consider the 2nd issue " In what capacity did Lakshmakka, the widow of Pedda Tippayya, take a half share in

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the property?" The learned vakil for the appellant contends that she took only a widow's interest in it as the representative of her husband Pedda Tippayya, and that the plaintiff as his daughter was entitled to succeed to it on the death of Lakshmakka. The learned Advocate-General on the other hand contends that as the two brothers were undivided in interest and the property passed by survivorship to the junior brother, Lakshmakka must be taken to have obtained the half share purely as a bounty. He contends that on the correct construction of Exhibits IV and XVI what she took was a gift from her brother-in-law, and that, even if under those documents she was intended to have only a life-interest, her right cannot be taken to be a widow's estate descendible to the reversionary heirs of her husband, and that on her death the reversion would pass to Chinna Tippayya or his heirs, and that the plaintiff in any event has no right to succeed to the property. If Lakshmakka was promised an absolute right to the half share under Exhibit IV or got it subsequently by division between her and Bhagamma, the plaintiff, is of course out of Court, as she is only a step-daughter of Lakshmakka. In our opinion, Exhibits IV and XVI must be taken together in order to determine the right acquired by Lakshmakka in the half share of the family property; and taken with the circumstances of the case we have no doubt that the intention of the parties was that she was to have the half share as the representative of her deceased husband. If she validly adopted a boy, this share whould pass to him; otherwise she would continue to hold it. She was no doubt not entitled to partition as the widow of a deceased co-parcener. But it seems to be clear that it was the intention of Chinna Tippayya to treat her as if she was entitled to such a share. For what reason he did so it is immaterial to consider. If Chinna Tippayya could in law validly give her a widow's interest we feel no doubt that her half share must pass to her husband's reversioners and the plaintiff being the nearest reversioner would be entitled to succeed. The learned Advocate-General contended that a woman's estate could be obtained by a Hindu family only by inheritance, that such an estate cannot be created by contract of parties or by a grant. We are unable to agree with him. It is not denied that a Hindu female is capable of possessing two different kinds of estate passing by different rules of inheritance, namely a woman's estate, with respect to which she does become a stock of descent and which passes after her death to her husband's heirs and an absolute estate which passes to her own heirs, *i.e.*, the heirs to a woman's *peculium*. It has been decided by the Judicial Committee of the Privy Council that a woman's

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estate may be created in favour of a daughter by contract (see *Radha Prosad Mullick* v. *Ranimoni Dasi*[1] and *Karmi Uddin* v. *Gobind Krishna Narain.*[2] And in determining the character of the estate taken in any particular case the rule enunciated in *Mahomed Shumshool* v. *Shevukram* [3] must be borne in mind that "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate especially an ancestral estate shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all "events women do not take absolute estates of inheritance which they are able to alienate." That such an estate could be created is assumed in *Sambasiva Ayyar* v. *Viswam Ayyar* [4] and *Sambasiva Ayyar* v. *Venkataswara Ayyar*,[5] though the learned Judges did not agree on the construction of the particular instrument in the case as to whether it created a widow's estate or an absolute estate. It has also been decided that property could be given to a Hindu male with the incidents of ancestral property in which his sons would acquire a right by birth (See *Subbarayar* v. *Subbammal*[6], *Sudarsanam Maistri* v. *Narasimhulu Maistri*[7] Per Bhashyam Ayyangar J., *Seth Jaidial* v. *Seth Sita Ram*[8] and *Munisami Chetti* v. *Marudammal*[9]. We do not think that the observation at page 465 in *Anandrao Vinayak* v. *Administrator-General of Bombay*[10] relied on by the learned Advocate-General throws any doubt on the possibility of such an estate being created. In *Timmana Charya* v. *Balacharya*[11] and *Bai Diwali* v. *Patel Bechardas*[12] there are observations to the effect that a stranger cannot give property to a Hindu impressing it with the character of ancestral estate. But assuming these observations to be well-founded, they do not touch the present case where instead of an allotment for maintenance being made to Lakshmakka she is treated by her husband's co-parcener more generously, and is given a half share of the property which her husband would have got on partition. The Advocate-General contended that to allow parties to create such an estate would enable them indirectly to contravene the provision of law that they cannot by grant create rights of property in favour of unborn or unascertained persons, and he relies on the decision in

1. (1908) I. L. R. 35 C. 896 (P. C.)
2. (1909) L. R. 36 I. A. 138.
3. (1877) L. R. 2. I. A. 7 at p. 14.
4. (1907) I. L. R. 30 M. 356.
5. (1907) I. L. R. 31 M. 179.
6. (1900) I. L. R. 24 M. 219.
7. (1901) I.L.R. 25 M. 149 at pp. 154 & 155.
8. (1882) L.R. 8, I. A. 227 & 228
9. (1910) 20 M. L. J. 687.
10. (1895) I. L. R. 20 B. 450.
11. 4 Bom. L. R. 257.
12. (1902) I. L. R. 26 B. 445.

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Nistarini Dassi v. *Nundo Lal Bose*,[1] that went on appeal to the Privy Council in *Binode Behari Bose* v. *Nisturini Dassi*[2]. It was no doubt held in that case that a gift by will to the testator's reversionary heirs, whoever they might be after the death of his widow would be void. But it is no authority for the position that an estate known to and sanctioned by the Hindu Law cannot be granted in favour of a Hindu female simply because the succession would pass on her death by law to her husband's heirs and not to the heirs to her Stridhanam property. The heirs in such a case do not take under the grant itself but under the rules of law determining the line of inheritance to a particular kind of property held by the female owner. It has been decided that in the case of followers of the Marumakathayam law, a conveyance may be made to a woman with the incidents of tarwad property so as to give a right to her unborn childern (See *Kunhacha Umma* v. *Kutti Mammi Hajee*,[3] *Mooriyat Peetikayil Kunhamina* v. *Mooriyat Peetikayil Kunhamli*,[4] *Kabankandi Koma* v. *Sivasankarm*[5]. The Advocate-General's argument is really answered by the Privy Council *In Rai Bishen Chand* v. *Mussumut Asmaida Koer*[6]. There a Hindu executed a deed of gift of property in favour of his grandson and his brothers " who may be born hereafter." This gift was impeached as void on the ground that it was a gift to a class of persons some of whom were not born at the time of the gift. After deciding that the gift would take effect in favour of the grandson actually then existing, their Lordships observe as follows :—

" Now, in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed in the case of a partition between father and sons it is laid down in the books that if a son born after the partition of ancestral estate does not out of the residue of his father's estate get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga Chap VII. SS. 10, 11, and 12, which is a Bengal authority, but it refers to Vishnu and Yajnyavalkya authorities on which the Mitakshara is founded. Indeed, the principle of joint family is not less closely, but more closely, insisted on by the Benares school than by the Bengal School of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between *Satrujit's* heirs on

1. (1902) I. L. R. 30 C. 369.
2. (1905) I. L. R. 33 C. 180.
3. (1892) I. L. R. 16 M. 201.
4. (1908) I. L. R. 32 M. 315.
5. (1909) 20 M. L. J. 134.
6. (1883) I. L. R. 6 A. 560 (P. C.)

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the one hand, and his brothers, if any should be born, on the other. They are only showing that the notions present to the mind of the head of a Hindu joint family who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class."

It has moreover been held that a Hindu female may by prescription acquire property impressed with the character of a widow's estate if the title she asserted during the time of prescription was that of a widow holding as representative of her husband. (See *Bapanayya* v. *Peddi Chalamaiya*,[1] *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Suryanarayana Dhatrazu Bahadur Garu*.[2] It is unnecessary to consider whether a mere stranger can give property to a Hindu widow with the incidents of a widow's estate descendible to her husband's heirs. We think there can be no doubt that in circumstances like the present such an estate could be created. It amounts practically to nothing more than an allotment to Lakshmakka of a large share of the family property amounting to what her husband would have got at a partition instead of giving her a smaller portion which would be sufficient for her maintenance. We therefore hold that plaintiff is entitled to the properties of Lakshmakka.

The Lower Court has recorded no finding on the 5th issue. It will be requested to do so now after recording the evidence that the parties may adduce. The finding should be submitted within two months. Ten days will be allowed for objections.

[In compliance with the order contained in the above judgment, the District Judge of Cuddapah submitted thefollowing finding. Ed.]

" My finding on the 5th issue, which is the only issue on which I have been directed to record a finding is that the plaintiff is entitled to recover all the items claimed in Schedule A, all the items or the value thereof in Schedule B except 4, 5 and 17 which are said not to exist; and I disallow item No. 25 and allow only one buffalo as regards item No. 26; and all the items in Schedule C except item No. 1 which is reduced to Rs. 250 instead of Rs. 500 as stated by the 1st defendant and item No. 11 which is denied by the defendant to exist.

Plaintiff has put in a petition to amend the plaint as regards the number of a certain field which is wrongly put down as No. 69

1. (1898) 9 M. L. J. 33. 2. (1897) I. L R. 20 M. 256 (P. C.)

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which ought to be 95. The other side has contended that as the case is pending in the High Court I have no right to order that amendment. I accordingly leave it for the orders of the High Court."

The Court delivered the following

Judgment:—We have now to deal with the question raised in the 5th issue "which of the plaint properties the plaintiff is entitled to recover." The Judge in his finding has proceeded on the assumption that all immoveable properties purchased by the 1st defendant or by Lakshmakka out of the income of the property that the latter obtained at the division between her and her husband's dayadis would descend to the plaintiff as the heir of Pedda Tippayya. This assumption is wrong. The income of the estate held by Lakshmakka was entirely at her disposal, and any property purchased out of it would not descend to her husband's heir unless she incorporated it with the property held by her as the heiress of her husband. The plaintiff did not allege in her plaint that any such incorporation was made. Her case was merely that she was entitled to all acquisitions made by means of the income as a matter of law. Moreover there is nothing to show that the properties were purchased by Lakshmakka herself and not by the 1st defendant in whose name the title deeds stand. No doubt the 1st defendant admitted in his written statement that the purchases were made by him by means of the income of Pedda Tippayya's estate, but the plaintiff cannot ask us to draw from this fact the inference that the properties purchased by the 1st defendant were incorporated with Tippayya's estate. We must disallow plaintiff's claim with regard to items 3 to 7, 10 to 12 and 17 to 20 of Schedule A.

[Then their Lordships proceeded to deal with B and C Schedule properties. *Ed.*]

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Appeal from the Supreme Court of Ceylon.]

Present:—Lords Macnaghten, Shaw, Mersey and Robson.

Rowland Valentine Webster ... ... *Appellant.*

v.

William David Bosanquet ... ... *Respondent.*

Contract Act S. 74—Penalty and Liquidated damages—Distinction—Contract—Construction—Cause of action.

Webster *v.* Bosanquet.

Whatever be the expressions used in a contract describing the amount fixed in it as damages to be paid on breach of a covenant or contract, the question must always be whether the agreement to pay the damages fixed renders it unconscionable and extravagant and one which no court ought to allow to be entorced.

No hard and fast rule can be laid down as to what may or may not be extravagant or unconscionable to insist upon. It depends upon the facts and circumstances of each case at the time when the stipulation was made—*i.e.*, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract.

When it was impossible to foresee the extent of injury to the parties on breach, where loss was likely to be serious and the very uncertainty of it made it most reasonable for the parties to agree beforehand as to what the damages should be, especially having regard to the difficulties and expenses there will be in the proof of the amount of loss:—*Held* that the amount fixed as liquidated damages in case of breach was not a penalty.

Plaintiff and defendant agreed that the defendant should not be at liberty to sell during a certain period "the whole or *any part* of the tea crops of certain estates" to any person other than the plaintiff without first offering him for buying the same on certain conditions and the agreement fixed £ 500 as liquidated damages to be paid by defendant to plaintiff on breach of the covenant.

Held on a construction of the contract that "part of a crop" meant not packets which might be sold over a grocer's counter but several parcels of the same crops whether the sale be of the whole or part of the crop, whether in one lot or in many; and that the sale of portions of the same crop as in the case before their Lordships could not amount to more than a single breach for which the penalty fixed was £500 on the whole.

A. Grant, K. C., and *Thompson* for appellant.

Upjohn, K. C., and *Corbett* for respondent.

Their Lordships' judgment was delivered by Lord Mersey.—

This is an appeal from a judgment of the Supreme Court of Ceylon, dated 21st December 1909, reversing a judgment of the District Court of Colombo, dated the 1st March 1909. The question raised by the appeal is whether a payment stipulated by deed to be made by the defendant to the plaintiff is to be regarded as a payment by way of liquidated damages or merely as a penalty.

18th January 1912.

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The Court of first instance held that the stipulation was for a payment by way of liquidated damages; the Supreme Court took a different view and held that the stipulation was for a penalty only.

There is no dispute about the facts of the case, and they are as follows:—

In 1891 the plaintiff and the defendant entered into partnership for the purpose of exporting and selling Ceylon tea, and particularly tea grown upon certain estates in the island belonging to the defendant and known as the Palamcotta and Mariwalla estates. The part of the plaintiff in connection with the enterprise was to travel for the purpose of pushing the sale of the tea, and this he did so successfully that by the year 1895 he had established a valuable trade. In that year the partnership was dissolved, the plaintiff buying the defendant's interest in the goodwill for a sum of 3,500 *l.* and taking over the assets at a valuation. The dissolution was effected by a deed, dated the 14th February 1895, which contained among other things a provision that the defendant should for a period of ten years after the 30th July 1896 sell the whole or any part of the Mariwalla and Palamcotta Estates to the plaintiff at a valuation so long as the plaintiff should pay to the defendant yearly a sum of 75 *l.* for the use of the names of the two estates, and should express his intention of purchasing the whole or any part of the said crops. The deed then provided as follows:—

"And the said Bosanquet shall not be at liberty to sell during the period aforesaid the whole or any part of the tea crops of the Mariwalla and Palamcotta Estates to any person other than the said Webster without first offering to the said Webster the option of buying the same, so long as Webster shall pay to Bosanquet the yearly payment of 75 *l.* and if the said Bosanquet shall fail, neglect, or refuse to sell the whole or any part of the crop of Mariwalla and Palamcotta Estates, as hereinbefore provided to the said Webster, he shall pay to Webster the sum of 500 *l.*, as liquidated damages and not as a penalty."

The plaintiff duly performed his part of this agreement, but in the first half of the year 1906, the defendant, in breach of the agreement, sold to persons other than the plaintiff five different parcels of tea of the Palamcotta crop, amounting in the aggregate to 53,315 lbs. without offering to the plaintiff the option of buying the same. In February 1908, the plaintiff issued his writ in the present action, claiming the sum of 500 *l.*, as liquidated damages in respect of the said breach. It was alleged (and found as a fact at the trial) that the sales had been made by the defendant under a mistake of fact as to the date on which the obligation to give the option of purchase to the plaintiff terminated, but

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the learned Judge held this to be immaterial, and being of opinion that the stipulation, for the payment of the 500 *l.* meant what it said, namely, that it should be by way of liquidated damages, gave judgment for the amount claimed. The Supreme Court over-ruled this decision and sent the case back to the Court of first instance to ascertain the actual damage sustained by the plaintiff by reason of the breach. On the rehearing the plaintiff offerred no evidence as to damages, and the Court awarded the plaintift by way of nominal damages the sum of 10 *l.*, which amount the defendant had brought into Court in satisfaction of the plaintiff's claim. The question is which view of the contract is right.

The cases in which the courts have had to consider whether a stipulated payment in respect of the breach of a contract should be regarded as liquidated damages fixing once for all the sum to be paid or merely as a penalty covering the damages though not assessing them, are innumerable and perhaps difficult to reconcile. But it is unnecessary to examine them for their effect is succintly and very clearly stated in the case of *The Clyde Bank Engineering Company Limited* v. *Done Jose Castaneda.*[1] From that case it appears that whatever be the expression used in the contract in describing the payment the question must always be whether the construction contended for renders the agreement unconscionable and extravagant and one which no court ought to allow to be enforced. After stating this principle Lord Halsbury proceeded as follows :—

"It is impossible to lay down any abstract rule as to what may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case.'

And Lord Davey, in delivering his opinion, says :—

"You are to consider whether it is extravagant, exorbitant, or unconscionable at the time when the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract."

Applying the principle to be found in these judgments to the facts of the present case the proper construction to be put upon the contract appears to their Lordships to be plain. When making the contract it was impossible to foresee the extent of the injury which might be sustained by the plaintiff if sales of the tea were made to third parties without his consent. That such sales might seriously affect his business was obvious, and the very uncertainty of the loss likely to arise made it most reasonable for the parties to agree beforehand as to what the damages should be. And, furthermore, it

1 (1904) 1905 A. C. 6.

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is well-known that damages of this kind, though very real, may be difficult of proof, and that the proof may entail considerable expense. This consideration also afforded a reason for fixing the amount beforehand. It was suggested in the course of the argument that to treat the 500 *l.* as liquidated damages might involve such extragavant consequences as to render the agreement absurd, for the sum might be claimed in respect of every pound of tea sold in breach of the stipulation. Their Lordships, however, are of opinion that the stipulation is not capable of such an interpretation. The parties to the agreement were merchants using language in the sense in which it is used in their trade. When they speak of a "part of crop" they are not contemplating packets which might be sold over a grocer's counter, but parcels such as were in fact sold in the present case. Moreover, the breach consists of the selling to third parties. It matters not whether the sale is of the whole or part of a crop, nor whether it is made in one lot or in many. The agreement neither says nor means that, if successive parcels forming parts of the same crop be sold, a right to claim 500 *l.* in respect of each sale shall accrue; all such parts put together cannot amount to more than the whole crop, and the penalty for the sale of the whole is limited to the 500 *l.*

For these reasons Their Lordships are of opinion that the contract stipulates for what in words it says, namely for a payment of money by way of liquidated damages and not by way of penalty.

They will therefore humbly advise His Majesty that the appeal should be allowed, that the judgment of the Supreme Court should be set aside, and the original judgment of the District Court restored. The respondent must pay all the costs in the Courts below and also the costs of this appeal.

Solicitors :—*Abbott and Hudson* for appellant.

Solicitors :—*Standard and Bosanquet* for respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

The Secretary of State for India in Council represented by the Collector of Anantapur } Appellant.* (*1st Defendant.*)

v.

Kalikhan and another ... ... Respondents. (*Plaintiffs.*)

C. P. C. S. 424 (XIV of 1882)—Suit for injunction—Statute—Construction —Punctuation.

Secretary of State *v.* Kalikhan.

S. 424 of the old Code makes notice necessary in all suits against the Secretary of State for India in Council including suits for injunction.

Per *Sundara Aiyar* J:—Quære:—Whether the English law rule that punctuation cannot be taken account of in the interpretation of statutes should be applied to Indian Statutes?

The phrase "purporting to be done" in S, 424 C. P. C. applies only to public officers.

Second appeal from the decree of the Court of the Subordinate Judge of Bellary in A. S. No. 164 of 1907 presented against the decree of the Court of the District Munsif of Penukonda in O. S. No. 69 of 1906.

The Ag. Government Pleader (*L. A. Govindaraghava Aiyar*) for appellant.

A. Krishnasami Aiyar for respondents.

L. A. Govindaraghava Iyer, (Ag. Government Pleader) contended that notice which is required to be given by S. 424 of the C. P. C. Act XIV of 1882 has not been given; and the suit is consequently not maintainable. On the question of notice S. 80 of the new code corresponding to S. 424 is very clear. "In respect of any act" has reference only to the expression public officer. Notice is essential in all cases against the Secretary of State. *Secretary of State* v. *Rajlucki Debi,*[1] *Bachu Singh* v. *Secretary of State,*[2] *Secretary of State* v. *Gajanan Krishna Rao.*[3] In the last mentioned case the learned Judges made an exception where there was fear of an imminent injury. In this case there were no such circumstances present to bring it under the exception; *Secretary of State* v. *Gajanan Krishna Rao*[3] has been followed in *Sakharam* v. *Secretary of State for India.*[4]

A *Krishnaswami Iyer* for the respondent.

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* S. A. No. 2158 of 1910. 18th July 1912.

1. (1897) I. L. R. 25 C. 239.
2. (1902) I. L. R. 25 A. 187.
3. (1911) I. L. R. 35 B. 362.
4. (1911) 14 Bom. L. R. 353.

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The arguments of the appellant are based on the provision of the new code. The suit having been instituted when the old code was in force, the restrictions imposed by the new act should not be applied to this case. There are English cases which say that punctuation should not be taken as a guide in construing the acts of the legislature. " In respect of acts purported to be done by him in his official capacity" refers to the Secretary of State also. All acts done by public officers in their official capacity are imputed to the Secretary of State. This is the opinion of " Maclean, C. J. in *Secretary of State* v. *Rajlucki Debi*[1]." In all cases of injunction no notice need be given under S. 424. The word "*or*" between the " Secretary of State for India in Council" and the " public officer" is significant.

The section applies to those acts of the public officers for which both the Secretary of State for India in Council and the public officer concerned are liable. The expression " such public officer" in the new code is more clearly in the respondent's favour. If the legislature intended that " in respect of acts " were to apply only to the public officer it would have used of the word " *nor* " instead of "*or*." " *Nor* " would mean " *and or*." The point decided in *Bachu Singh* v. *Secretary of State*[2] has no application to the case.

The Court delivered the following judgments :—

Sundara Aiyar, J.—This second appeal must be disposed of on the objection taken by the defendant, the Secretary of State for India in Council, that the suit is not maintainable as no notice of it was given as required by S. 424 of the old code corresponding to S. 80 of Act V. of 1908. The plaint states that the Board of Revenue passed an illegal order that a certain sum of money not due by the plaintiff to Government should be collected from him and that " on account of the said order the plaintiffs have lost peace of mind and are much troubled." The plaintiffs ask for a decree granting an injunction restraining the 1st defendant, that is the Secretary of State for India in Council or any of his servants from collecting any amount from the plaintiff. The Subordinate Judge held that no notice was required under S. 424, C. P. C. in such a case. The view he took was that the section applied only to suits for damages. This position is in our opinion entirely untenable. S. 424 enacted "No it shall be instituted against the Secretary of State for India in Council or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State for India in Council, delivered to, or left at the office of, the Secretary to the Local Government or the Collector

1. (1897) I. L. R. 25 C. 239. 2. (1992) I. L. R. 25 A. 187..

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Sundara Aiyar J.

of the District." The contention before us is that the section applies only when the suit is in respect of an act 'purporting to be done' and this it is said, does not include a suit for an injunction but only one for damages arising from the act done. The case for the respondent has been argued with great fullness and ability by the learned Vakil who has appeared for him but he has been unable to pursuade us that the view adopted in the decided cases, which is against him, is wrong. Two arguments have been urged on the meaning of the language of the section. It is contended that the words 'in respect of any act purporting to be done by him' qualify both 'The Secretary of State for India in Council' and 'public officer.' In the Government edition of the statute there is a comma after the word 'Council.' The object of the comma evidently was to show that the phrase 'purporting to be done' did not apply to 'Secretary of State for India in Council.' It is argued that punctuation cannot be taken note of in construing a statute. There is no doubt authority in English cases for this position but no Indian case has been cited to us, and it may be permissible to express a doubt whether the considerations which induced Judges in England to lay down such a rule would be equally applicable in the construction of statutes in this country. The question however does not depend on the punctuation alone. Now the expression 'Secretary of State for India in Council' is, as urged by Mr. Krishnaswami Aiyar for his own purposes, merely a name under which the Government is to be sued and does not denote either individual or a corporation. See *Kinlock* v. *Secretary of State for India in Council.*[1] If that be so, to speak of an act being done by the 'Secretary of State for India in Council' understood in that sense seems to involve some straining of language although it is pointed out that in *Secretary of State for India in Council* v. *Rajlucki Debi*[2], *Maclean* C. J. was of opinion that an act done by a public officer who is subjected to the authority of the Secretary of State for India in Council has no other than any official capacity assuming that he has any capacity at all and that the expression is not a mere name. This makes it unlikely that any distinction was intended to be made between the acts of Secretary of State for India in Council in his official capacity and other acts of his. On all these grounds we entertain no doubt that the phrase 'purporting to be done' was intended to apply only to public officer.

Another argument of the respondent is that the section applies only to suits arising out of acts done by public officers, whether they be against the Secretary of State for India in Council or

1. (1880) 15 Ch. D. 1. 2. (1897) I. L. L. 25 C. 239 at 243.

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against a public officer; in other words, he contends that the section should be read thus: "No suit shall be instituted in respect of any act purporting to be done by a public officer in his official capacity either against the Secretary of State for India in Council or against the public officer." But if this were the meaning we think more appropriate language would be used to indicate it. The respondent's construction requires in effect the omission of the comma after the word 'Council' and the insertion of one after the word 'Officer.' Besides there is reason to believe that the object of the Statute was to give the Government time for reflection whenever a suit is threatened against it and this would apply whatever be the nature of the suit. No authority has been cited in support of this contention. The *Secretary of State for India in Council* v. *Rajlucki Debi*[1] *Bachu Singh* v. *The Secretary of State for India in Council*,[2] *Secretary of State* v. *Gajanan Krishna Rao*[3] and *Shakharam Bagavan Patil* v. *The Secretary of State*[4] are all in favour of the construction contended for by the appellant that notice is necessary in all suits of whatever description against the Secretary of State for India in Council and we agree with the opinion expressed in those judgments.

It is then contended that the section should not be applicable to suits for injunction restraining The Secretary of State for India from doing a certain act. If the construction we have adopted of the language be correct, there is no room for excepting any class of suits for the operation of the section and we doubt whether it would be within the Province of a Court of Justice to introduce an exception when the rule enacted by the Legislature is universal in its terms. The observations of Chandravarkar, J. in *Secretary of State* v. *Gajanan Krishna Rao*[3] and *Shakharam Bhagwan Patil* v. *The Secretary of State*[4] are no doubt calculated to show that the learned Judge was of opinion that where in consequence of an immediate injury threatened by the Secretary of State for India in Council it would not be humanly possible for the plaintiff to give the prescribed two months' notice of action, the section should not be held to apply. It is not necessary to say whether even this narrow exception can be made in accordance with the language of the section. In the present case it is not alleged that any very immediate injury of a serious character was threatened. Revenue officers of Government would no doubt have power to arrest the plaintiff for the debt alleged to be due to the Government but it is not stated that any immediate arrest was threatened. On the other hand the suit itself was not

1. (1897) I. L. R. 25 C. 239.
2. (1902) I. L. R. 25 A. 187.
3. (1911) I. L. R. 35 B. 262.
4. (1911) 14 Bom. L. R. 353.

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institute until after the expiration of more than two months from the date on which the cause of action is alleged to have arisen. There is therefore no room for any contention that it was not possible to give two months' notice before the suit was launched. The result is that the suit must be held to be not maintainable on the ground that no notice was given of it as required by S. 424 of the Civil Procedure Code. The decree of the Lower Appellate Court must be set aside and that of the District Munsiff restored with costs both here and in the Lower Appellate Court.

Sadasiva Aiyar, J:— I do not think I could usefully add any observation of my own as regards the construction of S. 424 of the Civil Procedure Code, and I agree with what my learned brother has just now said and also with what Mr. Justice Chandravarakar has said in the case in *Secretary of State* v. *Gajanan Krishna Rao*[1] and *Sakharan Bhagwan Patil* v. *The Secretary of State*,[2] on this point. So far as the word 'him' in the old S. 424 is concerned, the matter has been made very clear by the amended Act in which S. 80 has substituted the words 'such public officer' for the word 'him.' I do not think the Legislature intended to make any alteration in the law only to approve of those cases decided under the old code which confine the grammatical relation of the pronoun 'him' to 'public officer' and do not extend it to "The Secretary of State in Council."

Then, as regards the question of hardship if a suit against the public officer alone for an injunction could be brought without notice —a position on which I reserve my opinion—the fact that the plaintiff is prohibited from bringing a suit against the Secretary of State for India in Council without due notice cannot cause irrepairable injury to plaintiff, for he could sue the public officer alone for his threatened act and obtain a temporary injunction and this will effectually prevent the threatened injury. As regards suits against the Secretary of State for India in Council large classes of such suits involve questions as to the legality of the acts done by subordinate public officers in respect of acquisitions of land under the Land Acquisition Act, recovery of arrears of all kinds of revenue, of prevention and removal of encroachments and of the performance of similar public duties and most of them do involve reliefs in the nature of an injunction. The Legislature must be deemed to have been aware of this patent consideration and if they had intended to exclude suits against the Secretary of State for India claiming the relief of injunction from the necessity of notice, they would have put in an exception under the section itself stating that in cases of injunction

1. (1911) I. L. R. 35 B. 362. 2. (1911) 14 Bom. L. R. 353.

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or in case where irrepairable injury is likely to be caused if an injunction is not at once granted the notice required by the first part of the section was unnecessary. I do not think that it is legitimate for the Courts to themselves graft on such exceptions to the section.

As regards the English case in *Flower* v. *Local Board of Low Leyton*[1] in which it was held that in a suit for an injunction against threatened injury, no notice need be given under the Public Health Act of 1875 before the suit is brought against the local authority. I respectfully dissent from that case and also from the *obiter dicta* of Mr. Justice Chandravarkar in the two cases in *Secretary of State* v. *Gajanan Krishna Rao*[2] and *Shakharan Patil* v. *The Secretary of State*[3] that a similar though more restricted exception could be grafted on to S. 424 by the decisions of Courts. If I do not put it too strongly I would say that such a course would be a fraud on the part of judiciary against the powers of Legislature, which powers as my learned brother remarked in the course of the arguments in the case are practically omnipotent. It will also lead to this anomaly that where a plaintiff pays up a demand due to Government loyally and out of respect to Revenue authority (but under protest) and then sues to recover the money so paid by him he ought to give two months' notice, but if he rushes to Court for an injunction against the Secretary of State acting through the Revenue Officer who is given statutory powers to recover the money, he need not give such notice at all. I do not think that that could have been the intention of the legislature. I might also add that if we give room for even a single exception of that kind, the ingenuity of litigants and of their legal advisers will be found to be quite equal to convert almost all suits against the Secretary of State into suits involving the relief for an injunction. I therefore agree that the Lower Court's decree should be reversed and that the suit ought to be dismissed with costs.

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1. (1877) 5 Ch. D. 347.
2. (1911) I. L. R. 35 B. 362.
3. (1911) 14 Bom. L. R. 353.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Kumaraswami Chetty ... ... Appellant. *(Plaintiff)*

v.

Kamakshi Ammal and others ... ... Respondents. *(Defendants.)*

Kumaraswami Chetty. *v.* Kamakshi Ammal.

Limitation Act Art. 96—"Decree obtained by fraud"—Decree obtained by fraud if a nullity—Right of suit to set aside decree obtained by false testimony.

A decree obtained by perjured testimony is one obtained by fraud within the meaning of Article 95 of the Limitation Act and a party to the decree cannot evade the operation of the article by professing to treat a prior decree of court in respect of the same relief a nullity on the ground of its having been obtained by fraud. *Mt. J. Koonwar v. B. Rup. Narain*[1] distinguished.

Quære:—Whether a suit to set aside a decree obtained by perjured testimony will lie *Venkatappa Naik* v. *Subba Naik*[2] questioned.

Second appeal from the decree of the District Court of South Arcot in A. S. No. 154 of 1910 preferred against the decree of the Court of the District Munsiff of Tiruvannamalai in O. S. No. 112 of 1909.

K. R. Subramania Sastri for appellant.

K. Jagannadha Aiyar for respondents.

K. R. Subramania Sastri submitted that a decree got by fraud such as perjured evidence is a mere nullity, and Art. 95 applies only to cases where the decree stands under a necessity of being set aside. The decree is a mere nullity if procured by perjured evidence and needs not to be set aside; he cited *Tallaprasadh* v. *Sriramalu.*[3] Procuring judgment by perjured evidence is fraud; *Venkatappa Naick* v. *Subba Naicker*[2].

K. Jaganatha Aiyer for respondent, was not called upon.

The Court delivered the following

Judgment:—*Sundara Aiyar* J.—This is a suit for redemption. The plaintiff had instituted a previous suit for the same relief. It was found in that suit that the defendants had obtained a complete title to the property by a sale subsequent to the mortgage sought to be redeemed in the present suit. The plaintiff alleges that the previous decree was obtained by fraud because the decision proceeded on perjured

S. A. No. 2055 of 1910. 22nd July 1912.

1. (1866) 6 W. R. 165. 2. (1905) I. L. R. 29 M. 179.
3. (1907) I. L. R. 30 M. 402.

Kumaraswami Chetty. v. Kamakshi Ammal.

testimony adduced by the defendants. The suit has, admittedly, been instituted more than three years after the plaintiff became aware of the fraud.

The District Judge has held that this suit is governed by Article 95 of the Limitation Act and that it must be held to be barred by limitation. Article 95 provides a period of three years for a suit to set aside a decree obtained by fraud and the starting point is the date from which the plaintiff has knowledge of the fraud.

Two arguments have been urged in support of this Second Appeal. It is contended that the suit is substantially one for redemption, that any decree obtained by fraud is a nullity and may therefore be ignored by the plaintiff and that he is not bound to get it set aside. The learned vakil says that in several reported cases a decree obtained by fraud is spoken of as a nullity. Admittedly in none of those cases had the question of limitation to set aside a decree obtained by fraud to be decided. It is clear to our minds that, when there has once been an adjudication by court between parties disentitling a plaintiff to a certain relief, the same relief cannot be asked for unless the previous decree be got rid of. The decree is binding on both parties so long as it stands and it is not open to either of the parties to ignore it. The Legislature has provided a specific article for getting a decree obtained by fraud set aside. For purposes of limitation, at any rate, Article 95 must be regarded as conclusive. A decree is not a transaction between parties and it is unnecessary to consider the difference between transactions which are voidable and those that are void. There can be no doubt that a decree by court is an impediment in the way of a party obtaining a relief inconsistent with it, and this impediment has to be got rid of within the period prescribed by the Legislature. The case cited by Mr. Subramania Sastri *Mussamut Jhisoman Koonwar* v. *Bahoo Rup Narain Singh and others*,[1] is in accordance with our view. There it was held that in such a case the previous decree obtained by fraud has to set aside. There was no article in the Act of 1859 specially applicable to such a suit and it was therefore held that the period of limitation applicable was six years.

It is next argued that Article 95 is only applicable where the fraud by means of which the decree was obtained was a fraud upon the party and not upon the court and that in this case the fraud being the adducing of perjured testimony it was a fraud upon the court. We are entirely unable to apprehend this distinction in the case of

1. (1866) 6 W. R. 165.

Kumaraswami Chetty. v. Kamakshi Ammal.

decrees. Every fraud by means of which a decree is procured is a fraud both upon the court and upon the party unless the decree be one obtained by a compromise between the parties.

We are therefore of opinion that the decree of the District Judge was right. We dismiss the Second Appeal with costs.

Sadasiva Aiyar J.—I wish to add only a few sentences. While third persons might be allowed to treat a decree obtained by fraud as a nullity, the parties themselves, if they had been properly represented in the suit and had the opportunity for conducting their respective cases could not treat it as a nullity. I also wish to add that I should not be understood as admitting that a plaintiff can maintain a suit to set aside a decree on the ground of fraud simply because the decree had been obtained on perjured testimony. I knew it has been so held in *Venkatappa Naick* v. *Subba Naick*[1] but I have grave doubts as to the correctness of that decision. It is however unnecessary to express my final opinion in this case on that question, especially as the said question has not been argued before us.

Sundara Aiyar J.—I may add that I agree with the observations of my learned brother.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir. Charles Arnold White, KT., Chief Justice and Mr. Justice Benson.

Vaithilinga Mudali ... *Appellant* *1st Plaintiff.*

v.

Murugian *alias* Natesa Mudali.. *Respondent* *Defendant.*

Vaithilinga Mudali v. Natesa Mudali.

Hindu Law—Adoption—Orphan—Invalid adoption—Effect—Estoppel—Essentials—Conversion of suit for ejectment into one for partition.

An orphan cannot be a adopted under the Hindu Law.

An invalid adoption does not *per se* destroy the adoptee's rights in his natural family.

No estoppel can arise in the absence of any allegation that the conduct of the other party induced the person who sets up the plea to alter his position to his disadvantage.

A suit in ejectment cannot be converted into a suit for partition.

Second Appeal from the decree of the District Court of Tanjore in A. S. No. 565 of 1907 presented against the decree of the Court of the District Munsif of Tiruturaipundi in O. S. No. 75 of 1905.

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1. (1905) I. L. R. 29 M. 179.

* S. A, 1216 of 1908. * 3rd May 1912.

Vaithilinga Mudali v. Natesa Mudali.

S. Muthiah Mudaliar for appellant.

T. V. Gopalsami Mudaliar for respondent.

There were four divided brothers in a Hindu family. One was said to have been given in adoption long ago to another family, and another died in 1892. The other two brothers claimed the whole of the deceased's property on the ground that the other brother was adopted. The fact of the adoption as well as its validity was questioned by the defendants and the suit was wholly dismissed.

S. Muthia Mudaliar for appellant (plaintiff)—In the case of an adoption made long ago and which is found, every presumption in favour of its validity must be made owing to lapse of time which would have effaced all available evidence. *Rajendranath* v. *Jogendranath.*[1] There is the long acquiescence of the members of both the families. If the adoption is invalid then the plaintiff is entitled to at least two-thirds and the District Judge is not entitled to dismiss the suit. *Ahmad Wali Khan* v. *Shamshul Jahan.*[2] Or. VI Rule 17 and 18, C. P. C.

Authority given by parents to others to give their boy in adoption to a third person can be exercised by them after the parents' death, *Balnanta Rao* v. *Chindaman,*[3] *Venkata* v. *Subhadra.*[4] *Vijiarangam* v. *Lakshman.*[5]

T. V. Gopalaswami Mudaliar. Rajendranath v. *Jogendranath*[1] is a case where genuineness of an old document was in question and not the validity of an adoption made long ago. The distinction between the cases quoted and the present case is that in them the question was one of estoppel between the natural and adoptive family. Here the dispute is between the members of the natural family. The adopted son cannot be compelled to go to the adoptive family simply because it was thought by his natural brothers that he was adopted. Adoption of an orphan is invalid *Subbalu* v. *Ammakutti.*[6] At least one of the parents should be alive *Balvanta Row Bhaskar* v. *Beerja Bai*[7] *Bashetiappa* v. *Sivalingappa,*[8] *Tirbhuvan Bahadur Singh* v. *Rajah Ramesvar Bajsh Singh.*[9] The case of *Haimanchull Singh* v. *Gunshan Singh*[10] shows that long enjoyment under an invalid in adoption will not

1. (1871) 14 M. I. A. 67.
2. (1906) I. L. R. 21 A, 482 P. C.
3. (1870) 7 Bom. H. C. R. Ap 33, 35
4. (1883) I. L. R. 7 M. 548.
5. (1871) 8 Bom. H. C. R. O. C. J. 244.
1. (1871) 14 M. I. A. 66, 72.
6. (1864) 2 M. H. C. R. 129.
7. (1869) 6 Bom. H. C. R. O. C. J. 83 85.
8. (1873) 10 Bom. H. C. R. 268.
9. (1906) 16 M. L. J. 440, 443.
10. (1834) 5 W. R. 69 (P. C.)

Vaithilinga Mudali v. Natesa Mudali.

avail him anything as regards adoption. The suit is for the whole, it cannot be amended into one for partition, as there will be equities that could be pleaded in the latter kind of suit for ejectment cannot be converted into one for redemption—*Haimim Chull* v. *Kumer Gunshen*[1] proper suit can be brought by the plaintiff as he is not yet learned *Ananda Rao* v. *Ganesh*[2] only raises a presumption when facts are not known. But here it is known that the parents died already. *S. Muthia Mudaliar* replied.

The Court delivered the following

Judgment:—The facts out of which this Second Appeal arises may be stated as follows:—

There were four divided brothers in a Hindu family. The plaintiffs are two of these. Another was Akshayalinga, who was apparently adopted by one Subba Mudaliar in 1873. But in the course of the suit it was found that the adoption was invalid because both the father and mother of Akshayalinga were dead at the time of his apparent adoption. The fourth brother was Viswalinga, who died in 1892. The dispute is in regard to his property. The Plaintiffs claimed it as his reversionery heirs, and their suit was to recover it from the defendant, who is the son of Akshayalinga, and who is said to have trespassed upon it in 1910. The defendant originally claimed the property as the self-acquisition of Akshayalinga purchased *benami* in the name of Viswalinga, but both the Courts below found against that plea. In the alternative defendant resisted the plaintiff's suit on the ground that, as the adoption of Akshayalinga was invalid, he (defendant) had not lost his rights in his natural family, and was therefore entitled to one-third of the property, and plaintiff could not recover even the remaining two-thirds in this suit as it is framed as a suit in ejectment against a trespasser, and cannot be converted into a suit for partition. The District Judge accepted this alternative defence and dismissed the plaintiff's suit.

The plaintiff's appeal. They contend that the adoption of Akshayalinga having been made so long ago as 1873, and having been treated as a valid adoption by Akshayalinga himself (Exhibit J in 1878) and by Subba Mudaliar (see his will, Exhibit II in 1878) and generally by the family, the defendant cannot now deny the validity of the adoption. It is not, however, shown how any estoppel arises against the defendant's plea. The four brothers were divided before Akshayalinga's apparent adoption, and it is not shown

1. (1911) 12 J. C. 387. 2. (1870) 7 Bom. H. C. R. Ap. 33.

Vaithilinga Mudali v. Natêsa Mudali.

that in consequence of the adoption, the plaintiff's position has been in any way changed to their disadvantage, so as to render it inequitable that the defendant should be restored to his place in his natural family. This appears to be the test which should be applied in accordance with the principle underlying the decisions in *Gopalayyan* v. *Raghupathi Ayyan*[1] and *Parvatibayamma* v. *Ramakrishna Rau*[2]. It is hardly necessary to quote authority for the proposition that an invalid adoption does not *per se* destroy the adoptee's rights in his natural family. *Bawani Sankara Pandit* v. *Ambabay Ammai*[3] approved in *Lakshmiappa* v. *Ramaka and others.*[4]

But it is contended for the plaintiffs that the apparent adoption having taken place so long ago as 1873 and having been acquiesced in by all concerned for so long, it ought to be now presumed by the court that the adoption was made in pursuance of an authority given by some person competent to give away the son in adoption. No doubt the presumption was raised in the case of *Anandrav Sivaji Etal* v. *Ganesh E. Bokil*[5] but no authority for the decision is quoted, and that case was essentially different from the present case, for there the adoptee desired to maintain the adoption, whereas in the present case, the adoptee's son disclaims it, the adoptee being dead. No doubt if there was evidence that Akshayalinga's father gave him to Subba Mudali and the latter accepted him with a view to adoption, the adoption though made years afterwards, and after the death of the father, would be valid because there was the essential giving and taking of the child with a view to adoption. *Venkata* v. *Subhadra*[6]. But there is no such evidence in the present case, nor are there any other circumstances by which the suggested presumption could be supported. There is abundant authority that no one but the parents of a child can give him away in adoption and therefore that an orphan (as Akshayalinga was at the time of adoption) cannot be given away in adoption either by himself or by any one else. *Subbaluvammal* v. *Ammakukutti Ammal*[7] *Balavantreev Bhaskar* v. *Bava Bai and Chintawan Maddan*[8] *Bashetiappa Bin Basalingappa* v. *Shivlingappa Bin Ballappa.*[9]

We, therefore, hold that the adoption of Akshayalinga was invalid, and that the defendant has not lost his rights in his natural family.

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1. (1873) 7 M. H. C. R. 250.
2. (1895) I. L. R. 18 M. 145.
3. (1863) I. M. H. C. R. 363.
4. (1878) 12 Bom. H.C.R. 364 at 397.
5. (1870) 7 B. H. C. R. A. XXXIII & XXXV.
6. (1884) I. L. R. 7 M. 548.
7. (1864) 2 M. H. C. R. 129.
8. (1869) 6 B. H. C. R. (O. C. J.) 83.
9. (1873) 10 B. H. C. R. 268.

Vaithilinga Mudali v. Natesa Mudali.

We think that the District Judge is right in holding that the present suit, which is one in ejectment, cannot be properly converted into a suit for partition so as to give plaintiffs a decree for two-thirds of the plaint property. There may well be other property which would have to be brought into hotchpot if the plaintiffs should sue for partition.

Their right to obtain partition in a suit properly framed for the purpose is apparently not yet barred, and they must be left to that remedy.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Chintala Raghava Reddy and another .... *Appellant** (*Plaintiff.*)

v.

Chintala Krishna Reddy ... ... *Respondent* (*Defendant.*)

Raghava Reddy v. Krishna Reddy.

Provincial S. C. Act Art. 31—Second appeal—Suit of Small Cause nature —Question of title involved.

A suit for damages for trespass is a suit cognizable by a Court of Small Causes even though a question of title is involved therein; and no second appeal lies if the value of the suit is less than Rs. 500.

Sitab Rai v. Dubal Nagesia,[1] dissented from.

Second Appeal from the decree of the District Court of Cuddappah in A. S. No. 114 of 1909 preferred against the decree of the Court of the District Munsif of Madanappalli in C. S. No. 169 of 1908.

T. V. Muthukrishna Aiyar for appellants.

S. Srinivasa Aiyar for *T. V. Mahilamani Pillai* for respondent.

T. V. Muthukrishna Aiyar cited *Sitab Rai* v. *Dubal Nagesia*[1] and submited that the cutting of trees having been in assertion of a title to immoveable property, a second appeal lies.

The Court delivered the following:—

Judgment.—The plaintiffs sued to recover damages from the defendant on the ground that he removed the wood of certain trees on the bund of a bank. The plaintiff's claim is that they are entitled to the trees as Desabandam Inamdar. The defendant who is a ryot

* S. A. No. 721 of 1911. 26th July 1912.

1. (1907) 6 C. L. J. 238.

Raghava Reddy *v.* Krishna Reddy.

claims that the plaintiffs are not exclusively entitled. The prayer in the plaint is that the defendant should pay Rs. 250 damages being the value of the trees. The value of the suit in the Munsiff's Court is less than Rs. 500. It is objected by the respondent that no second appeal lies. The contention seems to us to be obviously right. Mr. Muthukrishna Aiyar for the appellant relies on *Sitab Rai* v. *Dubal Nagesia*[1] decided by *Holmwood* and *Sharfuddin* JJ. The judgment in that case is based on the ground that in the written statement the defendant claimed title to the tees cut by them and the question raised on appeal was also one that related to title. This is not a sufficient ground for holding that a suit which is of the nature of damages for trespass is not cognizable by the Small Cause Court. Questions of title are frequently raised in Small Cause suits and a discretion is given to the Small Cause Court by S. 23 of the Provincial Small Cause Courts Act to return the plaint for presentation to the Court having power to decide the question of title finally. That section clearly shews that if a question of title is involved that is not a ground for holding that the suit is not of a Small Cause nature but for directing it to be tried as a regular suit where in the interest of the parties it is desirable that such a course should be adopted. It is admitted by Mr. Muthurkrishna Aiyar that the decisions of this court have consistently held, that a suit for damages for trespass is a suit cognizable by a Small Cause court. We, therefore, uphold the preliminary objection and dismiss the Second Appeal with costs.

We are asked to convert the Second Appeal into a Civil Rëvision Petition but in the circumstances we are not inclined to do so.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Supreme Court of the Colony of Sierra Leone.]

Present:—Lords Macnaghten, Mersey and Robson.

In the matter of Moses Amado Taylor.

In the matter of Taylor.

Pleader—Professional misconduct—Contempt of Court—Alteration of subpœna.

Where a plaintiff who has been refused a warrant for the detention of the defendant by a Civil Court straightway starts a criminal process on the same subject matter and by means of allegations to which the Civil Court attached no credit, obtains his warrant from the criminal court, almost as a matter of course, he undoubtedly runs several risks of a serious character. He is not however, restricted by law to a single form of remedy. He may pursue all the legal

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*26th January 1912.

In the matter of Taylor.

remedies appropriate to his grievance, and his conduct does not necessarily involve any punishable contempt of the civil court, whatever may be its other consequences. Where a practitioner substitutes for the names in two subpoenas two other names he cannot be in the absence of evidence to defraud or other sinister motive convicted of forgery. At the most he should be taken to have committed an irregularity for which some pecuniary penalty on his part was an adequate punishment. A court cannot punish a man for alleged professional misconduct generally without specifying the charges and hearing him on those matters.

Appeal by special leave from three orders of the Supreme Court of the Colony of Sierra Leone, dated respectively the third day of September 1908, and the 7th and 10th days of May 1909.

Sir Robert Finlay K. C., Daniel Warde, and *J. M. Parikh,* for the appellant.

The Attorney-General (Sir Rufus Issacs, K.C.) and *S. I. T Rowlatt,* for the Judges of the Supreme Court and the Attorney-General of Sierra Leone.

Judgment.—*Lord Robson* :—The appellant Moses Amado Taylor is a native of Freetown, in the Colony of Sierra Leone, and a Barrister of the Honorable Society of Gray's Inn, where he was called to the Bar in June 1907. He was afterwards enrolled as a Barrister and Solicitor of the Supreme Court of the said Colony, and he now appeals from three orders of the Court.

By the first of those orders, dated the 3rd September 1908, he was fined 100*l.* and costs for an alleged contempt of Court; by the second, dated the 7th May 1909, he was fined 20*l.* in respect of an alleged forgery in the case of *Rex* v. *Ganson* and by the 3rd, dated the 10th May 1909, his name was removed from the Roll of Barristers and Solicitors of the said Supreme Court.

On the 6th May 1908 the appellant, acting professionally for one Michael Huggins, commenced an action in the Circuit Court of the Protectorate wherein the plaintiff Huggins, who was a native Railway Pointsman in the service of the Sierra Leone Government, sued one George Wright, who was foreman platelayer in the same employ, for damages for an alleged assault by shooting on the 30th January 1908 at Kangahum, in the Protectorate. When the action was begun Huggins had been dismissed from his employment, and on the 20th June the appellant wrote to Wright saying that if his client had not been peremptorily dismissed from work he would have advised him to drop the matter, and offering at the same time to settle it if Wright would agree to pay his client's wages for the six months' employment he had lost amounting to about 10*l.* and costs. He further stated that if these terms were refused

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he would apply for the Governor's fiat to have the action tried in Freetown before he (Wright) left the Colony.

No notice was taken of this letter.

On the 22nd August 1908 the appellant applied to the Acting Chief Justice, under Section 2 of the Debtor's Ordinance, 1883, for a warrant for the arrest of Wright on the ground, which was true, that he was about to leave the Settlement. The appellant at the same time stated that if Wright would settle on the terms before suggested, his client would be satisfied. The Acting Chief Justice refused this application because, as he states in his judgment delivered on the 3rd September 1908, he "saw that all he (appellant) wanted "was to get some money out of Wright and to use the warrant as a lever."

On the 24th August 1908 an application was made on the information of Huggins to one of the Police Magistrates, Mr. Vergette, at Freetown, for a warrant for the arrest of Wright upon a criminal charge of assault, with intent to murder, on the 30th January 1908, and a warrant was issued accordingly. As the Magistrate who granted it had no jurisdiction over matters arising in the Protectorate, except under the authority of the fiat of the Governor, which was wanting in this case, this warrant was in excess of his jurisdiction. Afterwards, in the proceedings for the contempt, the Magistrate stated that

"In granting the warrant, I was misled by the information, which did not go "to show that the offence was committed in the Protectorate; it was brought to " me while I was on the Bench."

The information was silent as to the place where the alleged assault was committed, but it so happens, however, that the warrant itself explicitly states that the offence took place at Kangahum in the Protectorate, a circumstance which must have been communicated by the appellant or Huggins. There does not appear, therefore, to have been any concealment or deception the part of the applicant, though there may have been inadvertence on the part of the Magistrate. The warrant was duly executed, and on the 25th August 1908 Wright was brought before the Magistrate. The appellant appeared for Huggins, the prosecutor, and at once asked the court to remand Wright so that he (the appellant) might apply to His Excellency the Governor to obtain a fiat to give the Magistrate jurisdiction. The Magistrate had, under the circumstances, no jurisdiction at all, and very properly refused that application, whereupon Wright was discharged.

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On the 27th August 1908 a summons was issued by the Acting Chief Justice and served on the appellant, calling on him to appear and show cause why an attachment should not issue against him for contempt of the Circuit Court of the Protectorate in causing Wright to be illegally arrested in gross contempt and defiance of the refusal of the Judge of the said court on the 22nd August 1908, to issue a warrant for the " arrest" of Wright.

The summons was heard on the 29th and 31st August 1908 by the Acting Chief Justice, who called and examined Wright, and the Magistrate, Mr. Vergette. The sole question then to be determined was whether or not the prosecution and arrest of Wright was a contempt of Court. The Acting Chief Justice came to the conclusion that it was. He was of opinion that the appellant and Huggins resorted to the criminal proceedings and procured the illegal arrest as a mere lever to get the money they were demanding from Wright.

"The whole proceeding" said the learned judge " was simply an abuse " of a process of justice. I am satisfied that the contemnors, in initiating their cri- " minal proceedings, were influenced by the intention of defying me for having " refused them the civil warrant of arrest they applied for and Taylor in parti- " cular had this object in view, for when I refused him the warrant, he became " impudent and threatened to complain to the Secretary of State.

" Even if the warrant had been valid, a contempt would have been com- " mitted, and the illegality of the warrant only intensifies the contempt."

It was the recourse which this Solicitor had, on behalf of his client, to another tribunal and a different process, in order to get what the learned Judge had decided he was not entitled to have, which constituted, in the learned Judge's view, the essence of the contempt.

It is true that the learned Judge found as a fact that appellant was not acting in good faith, but the sense in which that charge is put forward needs some explanation. It is not suggested, or certainly there is no evidence to support such a suggestion, that Huggins did not believe in the justice of his claim and did not so instruct his lawyer. It was, indeed, pointed out by the learned Judges that the alleged assault was seven months' old, and that if the contemnors had been acting in the interests of justice they would have taken their proceedings earlier, but mere delay in such circumstances can scarcely be advanced as a proof that the proceedings were fraudulent. It may be that the alleged contemnors have made themselves liable to proceedings at the instance of Wright, that is a question on which their Lordships express no opinion whatever and have no adequate means of forming one. It may be that the conduct of the appellant

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may turn out to be open to strong animadversion from other points of view than that of contempt of court, but for the purposes of the present proceeding it has not been proved, and cannot be assumed, that the proceedings before the Magistrate were tainted by any fraud on the part of the appellant. The question is therefore narrowed down to the bare ground stated in the summons, namely whether under the circumstances procurement of the warrant and the arrest consequent thereon constituted in law a contempt of the Supreme Court. Their Lordships think they did not. Where a plaintiff who has been refused a warrant for the detention of the defendant by a Civil Court straightway starts a criminal process on the same subject matter, and by means of allegations to which the Civil Court attached no credit, obtains his warrant from a different Court, almost as a matter of course, he undoubtedly runs several risks of a serious character. He is not, however, restricted by law to a single form remedy. He may pursue all the regal remedies appropriate to his grievance, and his conduct does not necessarily involve any punishable contempt of the Civil Court, whatever may be its other consequences.

The next order complained of, that of the 7th May 1909, arose out of the case of *Rex* v. *Ganson and others* in the Supreme Court, in which the Appellant was retained to defend three of the accused. He was desirous of securing the attendance of two witnesses, Ashley and Gittens, who were prison warders and applied to Master of Supreme Court for subpœnas for them. The subpœnas were accordingly issued on the deposit by the appellant of the conduct money, or allowance usual for witnesses of that class, (there being no fees payable), and were duly served by the bailiff. It turned out that the witnesses named said they know nothing about the case, so the appellant asked them to return the subpœnas to him which they did. He then struck out the name Ashley and Gittens, and substituted for them the names of two labourers, Lamina and Sorie. The subpœnas, so altered, were served by the appellant on Lamina and Sorie, and one of them Lamina was called and gave evidence. On these facts being disclosed at the trial the learned Chief Justice ordered Lamina's subpœna to be impounded.

Proceedings were subsequently taken against the appellant in the Police Court at Freetown on the charge that he had forged the subpœnas delivered to Lamina and Sorie.

The facts above stated, which were never in dispute, and which constituted the whole case against the appellant on this head, were

then duly proved, with one additional circumstance worthy of note. It appeared on cross-examination of the Deputy Master and Registrar of the Supreme Court, who is also Under Sheriff, that the appellant called on him on 27th February 1909 for a subpœna for, one Anderson. At that time the other subpœnas including those for Ashley and Gittens, had been issued, and the Deputy Master admitted that the appellant told him that he wanted some other witnesses substituted. He clearly referred to a proposed substitution of name in the existing subpœnas. The Deputy Master never told him that new subpœnas would have to be taken out. He made no protest or objection. It did not seem to strike him as being in any way a serious matter, though, possibly enough, if any one had paused to think about it, it would have been recognised as an irregularity.

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The appellant was committed for trial, and on the 1st May 1909 the Attorney-General preferred an information against the appellant charging him with (1) altering two copies of a subpœna with intent to defraud, (2) serving the copies, so altered, with intent to defraud and (3) uttering forged subpœnas, with intent to defraud knowing that they were forged.

The case came on for trial before the Chief Justice on the 3rd and 7th May 1909. Some of appellant's colleagues at the Bar made a representation to His Honour, pointing out that the effect of his pleading to the information would be a conviction for an indictable offence, the consequence of which would be the removal of his name from the Roll of the Inns of Court in London. His Honor, therefore on the application of the appellant's counsel consented that a plea should not be taken, the prisoner admitting his guilt and submitting to a fine of 20 *l.* which was paid.

Their Lordships are of opinon that the facts alleged against the appellant did not suffice to establish the very serious offence with which he was charged. The evidence does not show or suggest an intent to defraud on the part of the appellant, and indeed there seems to have been no motive so far as he was concerned which would give rise to any such intent. At the most he committed an irregularity for which some pecuniary penalty on his part was an adequate punishment.

A fresh proceeding was then immediately instituted against the appellant to have him struck off the Roll of Barristers and Solicitors of the Supreme Court of the Colony, and on the 10th May 1909 the Chief Justice made an order to that effect. This is the third

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order complained of. It is founded entirely on the two alleged offences already dealt with, and must stand or fall with them. It is true that the Chief Justice in giving his reasons for this order refers to the appellant's "conduct in other professional matters" as rendering him unfit to be on the Rolls of the Court, but no such matters are specified for the information of Their Lordships, nor has the appellant been heard on them. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed; that the order of the 3rd September 1908, should be discharged, and the sum of 100*l.* and the costs paid thereunder by the appellant be returned to him; that the order of the 7th May 1909 be discharged, except in so far as the same accepts the offer of the appellant to pay the sum of 20 *l.*; and that the order of the 10th May 1909 be discharged, and the name of the appellant restored to the Roll of Supreme Court of Colony of Sierra Leone.

No order is made as to the costs of this appeal.

Solicitor for the appellant *Thomas. D. K. Metcalfe.*

Solicitors for the Judges of the Supreme Court and the Attorney-General of Sierra Leone, *Burton, Ommanney and Rendall.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Allahabad].

Present:—Lord Shaw, Lord Robson, Sir John Edge and Mr. Ameer Ali.

D. Rani Dharam Kunwar ... ... *Appellant.*

v.

Balwant Singh ... ... *Respondent.*

Hindu Law—Authority to adopt—Construction—Successive adoptions—Estoppel of widow.

Rani Dharam Kunwar *v.* Balwant Singh.

Where a widow has asserted in the most solemn manner under her hand and seal her authority from the husband to make an adoption, she cannot be allowed to change her story when grave injustice will ensue to those who have acted in reliance upon her deliberate and repeated representations.

Held also on the question of the extent of authority in the case that the authority was in favour of the general authority to make successive adoptions on the death of the preceding adopted son.

Held also that the estoppel of the widow would only be personal to her and not bind others.

23rd April 1912.

Rani Dharam Kunwar *v.* Balwant Singh.

Sir R. Finlay, K. C., and Mr. Ross for appellant.

Mr. L. Degruyther, K. C., and Mr. Bhugwadin Dube for respondent.

Their Lordships' judgment was delivered by *Lord Robson* :—

The appellant is the widow of one Raja Raghubir Singh, and she sued the defendant in the Court of the Subordinate Judge of Saharanpur to obtain a declaration that she had not adopted him as a son to her deceased husband, and that if, in fact, any ceremony of adoption had been performed, it was invalid, owing to the absence of authority on her part from her husband to make such adoption. She further prayed that a document purporting to be a deed of adoption dated the 13th January 1899, should be declared void as being executed by her without such authority as aforesaid.

The Subordinate Judge dismissed the suit with costs and the High Court of Allahabad confirmed his decree.

Raja Raghubir Singh was the owner of the extensive Lordhaura Estate or Raj in the District of Saharanpur, in the United Provinces He died on the 23rd April 1868, at the age of 20 years, leaving the appellant,the Rani his widow and sole heir. She was then only 14 years old and *enciente.* Raghubir Singh was a religious man and was desirous of leaving behind him a son who should perform his shradh ceremonies and transmit to future generations the name and prestige of the Raj. When during his last illness, he became hopeless of recovery, recognising the possibility, that the child about to be born to his wife might be a girl or might not survive, he gave formal and emphatic directions to his wife in regard to the adoption of a son. The Rani herself has pledged her word as to the nature and scope of those directions on more than one public and important occasion. She did so particularly in the deed of the 13th January 1899 and in her defence to the action of one Baldeo Singh, which will be hereafter referred to. In the deed which she undoubtedly executed with full appreciation of its contents, she says :—

" He made this will to me by way of precaution. If, God forbid, you give birth to a daughter, or if a son be born but die after his birth, I strictly order you to adopt some son to me so that he might perform my shradh ceremony and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid) the son who might be adopted under this authority should die in your life-time you will have power to adopt another boy."

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In her defence to Baldeo Singh's action she informed the Court that she had full oral authority from her husband, and that he had not limited her to one, two, three or four sons.

The Rani gave birth to a son on the 16th December 1868. He died on the 31st August 1870 leaving the Rani owner of the Raj. In 1877 she adopted a boy named Tohfa Singh, declaring by deed that she did so in accordance with the will of her husband. Tohfa Singh died two years after and the Rani thereupon, in 1883 adopted a boy named Rani Sarup, still purporting to act in accordance with her husband's will. Rani Sarup died in 1885 and in 1893 the Rani made arrangements with a view to adopting a third boy. She executed an agreement in 1893 with one Lada Singh whereby he agreed to give his son "to comply with the will of her husband," but before the adoption was formally carried out this boy unfortunately died in 1896.

These successive deaths seriously impressed the mind of the Rani and she consulted her priests as to how the evil spirits might best be propitated and appeased. Acting on priestly advice she went on pilgrimages to Gaya and other places, and after making religious sacrifices she proceeded to arrange for another adoption.

On the 2nd June 1898 she entered into a written agreement with Ram Nivaz, the father of the respondent, whereby he made over her to her his two sons Balwant Singh (respondent) aged 14 years, and Tungal Singh aged 12 years:—

"In order that she may adopt any one of them she pleases having regard to their capability and her choice. Now the sons of me, the executant, shall live under the protection and custody of the said Rani Sahiba, subject to the fulfilment of the further conditions necessary for the validity of the adoption, the enforcement of which depends upon the particular time which may be considered suitable according to the rules of astrology. I shall have no claim as to their protection and guardianship."

The Rani ultimately selected the respondent, Balwant Singh, and preparations were made for his adoption on an imposing scale. The 13th January 1899 was appointed for the ceremony, and on that day a great entertainment was given by the Rani. The European and Indian officials of the district, together with hundreds of friends, relations, and caste-fellows, were present at the invitation of the Rani, and was hospitably regaled by her. The religious ceremonies proper to an adoption were all carried out and the newly adopted son was conducted to the *gaddi*, or throne, where he was formally installed.

The Rani next proceeded to bring about the marriage of the respondent and that ceremony was celebrated at her expense and in a manner befitting his new rank; in fact the respondent was thenceforth treated as a member of the Rani's family and cut off altogether from the family of his natural father.

In the following year Baldeo Singh, claiming as reversionary heir, instituted a suit against the Rani and the respondent, in which he sought to have it declared that he was entitled to the property on the death of the Rani and that the adoption of Balwant Singh was invalid. The Rani defended that suit, and, acting upon her instructions, her pleader made the statement as to her authority beforementioned, and she herself executed and filed a written statement alleging that she had in fact adopted the respondent and that the adoption was valid in every respect. Baldeo Singh failed in that suit on the ground that he was not a reversioner and had no *locus standi* to impeach the adoption in question, but the allegations of fact by the Rani in regard to the adoption are now very properly pressed against her.

The adopted son and the Rani have since quarrelled, and hence this action. She seeks to get rid of the adoption altogether.

At one time she stated that the seal affixed to the deed of adoption was not her seal, but she did not attempt to support this allegation by production of the seal regularly used by her, saying that she had mislaid it somewhere. However, documents admittedly executed by her and having seal impressions identical with that in dispute were produced and genuineness of the seal on the deed of adoption was placed beyond doubt.

The learned Subordinate Judge stated the issues on questions arising in the case as follows:—

"1. Whether the plaintiff had knowledge of the contents of the deed of adoption when she executed it and got it registered, or whether she had no knowledge of them?

"2. Was or was not the defendant adopted by the plaintiff?

"3. Had or had not the plaintiff any authority from her husband to adopt the defendant?

"4. If the first and second issues be decided against the plaintiff, how will it affect the claim?"

With regard to the first of these questions, the Rani pleaded that she was a *purdanashin* lady, and had never understood the contents of the document or had even known what it was; but the

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learned Subordinate Judge formed the opinion that the long examinations to which she had, on different occasions, been subjected, and the extreme shrewdness which she displayed in dealing with the questions, showed that she was an acute and intelligent lady, and that her only difficulties arose from the impossibility of making her statements fit in with undoubted facts. The deed was executed by her under circumstances of the greatest publicity, and with the assistance of competent and independant advice from many quarters. It was attested by no less than 28 witnesses. It was subsequently registered (on her own admission of execution) and was frequently and openly referred to by the Rani as a deed of adoption. The trial Judge therefore found that she executed the deed with full knowledge and understanding of its contents, and the High Court agreed with him.

The Rani next denies that the adoption was in fact carried out. The great entertainment of the 13th January 1899 was, according to her, only an intimation to the public that she meant at some future time to carry the adoption into effect. On this point, except for the allegations of the Rani herself, the only evidence worth considering was practically all one way, and as to the Rani's testimony, the learned Judge says, in plain terms, that she had made so many untrue statements that it was impossible to believe her, while the evidence produced on her behalf was utterly unreliable and untrue. The High Court agree with this finding, as to the justice of which there can be no doubt.

The third question, *viz.*, as to whether the Rani had authority from her husband to adopt the defendant, gives rise to the point which has been argued before their Lordships. The Rani contends that the authority conferred upon her by her husband did not extend, according to its strict wording, beyond the adoption of a second boy, in case the first adopted son should die and that such authority was therefore exhausted by the adoption of Rani Sarup. Their Lordships are of opinion that this was not the true effect of the authority in fact, conferred upon the Rani. She may not have remembered with precision the words used by her husband on his death-bed but whatever the exact words may have been, undoubtedly the effect they then produced on her mind, and on the minds of those about her, was that which she set forth in her statement in Baldeo Singh's action, *viz.*, "that her husband had not limited the authority to make such adoption to one, two, three or four sons."

That is the meaning on which she has consistently acted on until her quarrel with the respondent, and the words ascribed to her husband, according to her recollection in the deed of adoption, have

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always, until this litigation, been regarded by her, and her advisers, as intended to express a general authority. What the deceased Raja intended was that, if necessary, " some boy " should be adopted to him " so that he might perform my *shradh* ceremony, and yours, and perpetuate my name, and after your death become the absolute owner and possessor of the whole of my estate," but in expressing this intention he saw that it might defeated by death if construed in a restrictive sense as meaning some " one" boy, so he went on to deal with that contingency by directing, in substance, that effect was, in any event, to be given to the general intention, and if one boy died another boy was to be adopted. The trial Judge did not expressly decide this question of fact. He found, as did the High Court, that in the circumstances of this case, the Rani was estopped from alleging want of authority.

Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action where she was pleading as to her authority. Their Lordships, however, do not differ from the courts below in the view they have taken as to the applicability of the doctrine of estoppel in this case. Of course, the estoppel pleaded against the Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but, in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question. So far as the Rani herself is concerned it would indeed be difficult to have a stronger case of estoppel. She has asserted her authority in the most solemn manner under her hand and seal, and her conduct both before and after that assertion has been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family; he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of the privileges with which the Rani purported to endow him. He married on the faith of his adoptive mother's word, and no doubt has creditors who have sold him goods or lent him money in like reliance on her good faith.

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Under these circumstances the Rani's argument that the doctrine of estoppel does not apply because the defendent could show no loss or detriment is without any substance whatever and she must be held to her word and to the results of her conduct.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Appeal from Bengal.]

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Haji Buksh Elahi ... ... *Appellant.*

v.

Durlav Chandra Kar ... ... *Respondent.*

Bengal Acts (XI of 1859) S. 2, and (VII of 1868)—Arrears—Revenue sale —Validity of—Jumma in arrears—Settlement Manual—Settlements—Ordinary dates of payment of Kists, value of—Statute—Construction.

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No variation of the contract of parties and the statutory provision applicable thereto is possible by reason of general considerations or administrative rules which have not the sanction of the Indian Statute.

Act XI of 1859 (Bengal) does not sanction and by plain implication forbids the sale of any estate which is not at the time in arrear of Government revenue, the whole clauses of Act XI of 1859 (Bengal) as well as the provisions of S. 2 of Bengal Act of VII of 1868 are framed upon the express footing that they are to be applicable to the sale of estate which are in arrear of duty *Balakishen Das* v. *Simpson* [1] referred to.

The Kabuliat of the proprietor of the estate in the case (the holding being a Government tenure in Dihi Panchanagaram in the district of 24 Pergunnahs) stipulated that the jumma for every year shall be payable in the Collectorate, within the 28th June of every year. S. 2 of Act XI of 1859 (Bengal) did not make the rent payable under the Kabuliat on the 28th June "an arrear" within the meaning of the Act till the 1st July thereafter. The notification of the Board of Revenue issued on the 4th of December 1871 fixed "the 28th June of each respective year as the latest day of payment of the rents of all description and tenure in Khas Mehal Panchannagaram to that date; and tenures *in arrears* in the Mehal will be sold at the public auction to the highest bidder."

Held: the jumma in question in the case was not in arrear until the 1st July 1902, that the 28th June 1903 was the first date under the proclamation and the statute when there had arisen such a default as would enable the "*tenure in arrears*" to be sold; and that consequently the sale in March 1903 was invalid;

Held also that the ordinary dates of payments, rules contained in the Survey and Settlement Manuals and the date of the settlement itself were irrelevant to the consideration of the questions as to when an estate was in "*arrears,*" of the

*13th June 1912.

1. (1898) I. L. R. 25 C. 833 (P. C.)

jumma whithin in the meaning of the statutes and as to when the estates by reason of the "*arrears*" became liable to be sold for default within the meaning of the statutes and the proclamation of the Board of Revenue ;

Held also that Act VII of 1868 (Bengal) in applying Act XI of 1859 did not intend that any distinction should be made with reference to procedure and with reference to what constituted arrears.

Two consolidated appeals from two judgments and two decrees of the High Court at Calcutta, which set aside two decrees of the Subordinate Judge, Second Court of Zillah, 24 Pergunnahs in Bengal.

Sir R. Finlay, K. C., and *Ross* for appellant.

L. DeGruyther, K. C, and *Brown* for respondent.

Their Lordships' judgment was delivered by

Lord Shaw :—These are consolidated appeals from judgments and decrees of the High Court at Calcutta, which set aside two decrees of the Subordinate Judge in the Second Courts of 24 Pergunnahs, in Bengal. The question for determination by the Board is whether a certain sale of holdings for arrears of revenue, made to the respondent on the 16th March 1903, should be set aside.

On the 27th March 1902 the appellant purchased the holding for Rs. 16,000 from a son of Bhagaban Chandra Banerji. By the Kabuliyat, executed in the year 1874 by Bhagaban, who was thus the appellant's predecessor in title, it was stipulated as follows :—" I shall pay the said jumma in the Collectorate within the 28th day of June every year." The holdings were Government tenures in Dihi Panchannagaram in the district of 24 Pergunnahs, and it is not disputed that such tenures came under the Act XI of 1859 by virtue of the provisions of Act VII of 1868. By Sec. 2 of the former Act an arrear of revenue was described thus :—

" If the whole or a portion of a kist or instalment of any month of the era, according to which the settlement and kistbundi of any Mehal have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered as an arrear of revenue."

It seems accordingly hardly to admit of dispute that, if this section applied the rent payable under the Kabuliyat on the 28th June 1902 was not in arrear till the 1st of July thereafter.

Statute having thus made clear what was to be considered an arrear of revenue and at what date a past due payment was to be " considered as an arrear of revenue," namely, on the first of the month following that in which the payment fell due, the further question is this, *viz* :—Was this sale conducted in accordance with the procedure prescribed by statute for the sales of property in respect of unpaid arrears of revenue ?

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While, as stated, it was admitted that these tenures were brought under the Act of 1859 by the Statute of 1868, it was nevertheless contended that there was some distinction to be made with reference to procedure and with reference to what constituted "arrears." The contention is important, and was ably presented, but, in their Lordships' opinion, it is without foundation. The Act of 1868 above referred to extends the word "revenue" so as to include "every sum annually paid to Government by the proprietor of any estate or tenure in respect thereof." As to the attempt to differentiate procedure under the two statutes, the answer to that seems sufficiently contained in Sec. 30 of the later Act, which provides that it shall be read with, and taken as part of the former. The date when a past due payment was to be considered arrears having accordingly been settled by Sec. 2 of the Act of 1859, as quoted, their Lordships cannot agree with the judgment of the High Court, which introduces a reference to "the settlement" having been made on 18th February. Therefore, say the learned Judges :—

"In the case of an ordinary contract of lease, the annual jumma could be payable on 18th February in each successive year; but under Rule 7 of Part III, Clause 16, of the Survey and Settlement Manual, a settlement of revenue should ordinarily, take effect from the beginning of the financial year next after that in which the proceedings of the settlement officers have been completed. If that rule be applied, the settlement dates from April 1874, and the jumma would ordinarily be payable on 1st April each year."

The settlements and considerations here given do not appear to their Lordships to bear upon the present case. Whatever might be the ordinary date of payment or, *secondly*, whatever might be the date when "the settlement" is made or, *thirdly* whatever be the provision of the Survey and Settlement Manual, it does not appear to their Lordships' legitmate, by reason of any one or all of these things, to vary the actual date of payment in the Kabuliyat in the present case, which is the 28th June, or the actual date when a past due payment should be considered as an arrear, which is by the Statute of 1859 the 1st July 1902. No variation of the contract of parties and the statutory provision applicable thereto is possible by reason of general consideration or administrative rules which have not the sanction of Indian Statute. In the words of Lord Watson, in *Balikishen Das* v. *Simpson*,[1] referring to the Act of 1859:—The Act does not sanction, and by plain implication forbids, the sale of any estate which is not at the time in arrear of Govern-

1. (1898) I. L. R. 25 C. 833 (P. C.)

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ment revenue. The whole clauses of the Act of 1859, in so far as these relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of Sec. 2 of Bengal Act 7 of 1868, are framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty."

The date when by statute accordingly this revenue was considered in arrear was the 1st July 1902. At what date was default made in paying that arrear of revenue, so as to entitle a sale of the estate to be made? This which appears to Their Lordships to be the real question in the case, is clearly answered by the Act of 1859 itself and by the notification which followed thereon. By Sec. 3 of the Act "The Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue and all demands which by the Regulation and Acts in force are directed to be realised in the same manner as arrears of revenue, shall be paid in each district under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder." In compliance with this section, the Board of Revenue on the 6th October 1871 made and duly published a notification that it—

"has determined and fixed the 28th June of each respective year as the latest date of payment of the rents of all description of tenures in Khas Mehal Panchannagaram to that date, tenures in arrears in Mehal will be sold at public auction to the highest bidder."

Bearing in mind that the whole provisions with regard to sales are, in the language of Lord Watson, "framed upon the express footing that they are to be applicable to the sale of estates which are in arrear of duty," and that this tenure could not be considered in arrear until the 1st July 1902, it appears fairly clear that the 28th June 1903 is the first date under the proclamation and the statute when there has arisen such a default as would enable that "tenure in arrears" to be sold. It so happens that the payment in the present case is not a monthly, but an annual payment, and it further happens that the payment fell to be made on the 28th June 1902. The statute having by plain implication forbidden the estate to be considered in arrear until the 1st July, it appears to follow that the date fixed as that on which tenures in arrear will be sold must be the succeeding 28th June, namely in the year 1903. This estate, however, was sold in the previous month of March and Their Lordships agree with the view of the Subordinate Judge in thinking that the sale is accordingly invalid. In the language of the learned

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Judge. "The Board of Revenue are required, under Section 3 of the Act, to determine on what date *arrears of revenue* shall be paid up, in default of which payment the estates in arrear shall be sold at public auction."

Their Lordships agree with the view that the notification must, having regard to this section of the statute which authorised it, be applied to the present estate as fixing the 28th June 1903 as the date on which the arrears are not paid up, estates can be sold. If, in cases such as the present, this holds up the power of state until nearly a year's revenue stands in arrear, that matter, including the question whether more than one date for payment of arrears should be set up as periods of default is one for the consideration of the legislature and the Board of Revenue.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed, the judgment and decree of the High Court reversed, and those of the Subordinate Judge restored, the costs of the suit and of the Appeal being borne by the respondent.

Solicitors:—*W. W. Bax & Co.*, for appellants.

Solicitors:—*India Office.* for respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Appeal from the Judicial Commissioner of Oudh.)

Present:—Mr. Ameer Ali, Lord Shaw and Sir John Edge.

Mirja Sajjad Hussain and another ... *Appellants.*

v.

Nawab Wazir Ali Khan and others ... *Respondents.*

C. P. C. (XIV of 1882) S. 596—Concurrent finding—Judgment not containing materials for arriving at a conclusion—Judgment not vitiated by omission—Pardanashin deeds by—Onus.

Mirja Sajjad Hussain v. Wazir Ali Khan.

It will be to misconstrue entirely the provisions as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances of the case minutely and completely exhaustive, under the penalty that if they fail to do so the absence of elementary considerations in their minds might be presumed. The circumstance that the trial judge in the course of a long judgment did not set out certain materials of an elementary character for arriving at the conclusion at which he arrived on a question of fact will not take the case out of the rule that in case of concurrent findings of fact the right of appeal to the Privy Council depends upon the case involving a question of law. *Karuppannan Servai* v. *Srinivasa Chetti*[1] followed.

13th June 1912.

1. (1901) 29 I. A. 39.

Mirja Sajjad Hussain v. Wazir Ali Khan.

In the case of deeds and powers executed by Pardhanashin ladies it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by them. *Shambadi Koer* v. *Jago Badi*[1] and *Tacoordeen Jewarry* v. *Nawab Syed Ali Husain Khan*[2] followed.

This was an appeal from a judgment and decree, dated the 27th of March 1907, of the Court of the Judicial Commissioner of Oudh, which varied a decree of the Subordinate Judge of Lucknow, dated the 30th March 1906.

Sir E. Richards, K. C. and Mr. Ross for appellants.

Mr. L. DeGruyther, K. C., and Mr. Cowell for respondents.

Their Lordships' judgment was delivered by

Lord Shaw :—This is an appeal from a judgment and decree of the Court of the Judicial Commissioner for Oudh, dated the 27th March 1907, modifying a decree of the Subordinate Judge of Lucknow, dated the 30th March 1906. The suit was brought on the 1st April 1905.

It prayed for a declaration that all the property comprised in three deeds of endowment was *wakf*, that is to say, was endowed property, and the plaintiffs (the present appellants) as trustees under these deeds prayed for possession. The claim in short was, as stated, a " claim for possession of *wakf* property by right of trusteeship."

The claim of the appellants was dismissed by the Subordinate Judge in its entirety. Upon appeal, the Appellate Court upheld this decree with respect to the property comprised in one of the three deeds of endowment, *viz.*, that of the 13th November 1902, and reversed it with respect to the property included in the other two deeds: That is to say the endowments under these two deeds were held good.

The only question raised in the present appeal has reference to the last endowment, *viz.*, that constituted by the deed of 1902. The preceding deeds, one dated in 1886 and one in 1898, were somewhat limited in their character, and the defendants' contention under which these deeds were attacked is not now further insisted on.

Many years ago a tomb, or more properly speaking—as their Lordships are informed—a mausoleum, was erected in the city of Lucknow by one Madad Ali, now dead; and in 1886 he made a *wakf* of certain property for the upkeep of the mausoleum and the performance of religious observances in connection therewith. By

1. (1902) 29 I. A. 131.

2. (1874) I. I. A. 192, at 206.

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the deed of endowment Mehadi Begam was appointed one of two trustees, and upon the death of her Co-trustee in 1899 she continued to manage the property alone. In March 1898 she executed a document whereby she intended to add to the endowment, and she appointed the first plaintiff and her brother, the first defendant to be trustees of the original and added property. There appears to be no doubt that Mehadi Begam was much interested in the mausoleum and in its endowment, its upkeep, and its services. She died on the 4th February 1903, having on the previous 13th day of November executed another deed - that with regard to which the parties are now in contention.

Mehadi Begam was a *purdanashin* woman; she was separated from her husband, she was unable to read or write, and she was possessed, at the date of the deed which is questioned, of a fortune of about Rs. 50,000. It is not disputed that in the ordinary case of a deed granted by a *purdanashin* lady, it rests upon those founding upon the document to establish that she understood its effect and that the deed was intelligently and properly executed by her.

The *wakf* is undoubtedly of a comprehensive character. It proceeds upon the following narrative.

"Whereas the world is unstable and no reliance can be placed on this borrowed life, and after death there remains no trace either of soul or body, and whosoever has come to this world from non-existence will be completely annihilated one day, according to the proverb 'all that lies over it is mortal'; but through good and charitable deeds, or from one's male issue, if he is good and obedient, the continuance of one's name is possible, I, the declarant, have no issue of any kind from whom I may hope for the endurance of my name, consequently it seems proper to incline myself to the performance of good deeds."

The deed thereupon proceeds to endow:

"With possession in the name of undermentioned places in my life time in connection with the *Rouza* and for its maintenance, stability, and expenses, and also for sending people to Karbala and other holy places, as detailed below my personal, moveable and immoveable property, as specified hereafter, valued at Rs. 50,000."

She constituted herself as *Mutawalli*, that is as the manager of the religious endowment, and she appointed her brother and her general agent as trustees. Among the succeeding clauses the following appears to be important:—

"That the trustees shall in my life-time as well as after my death, continue to manage the undermentioned things just like myself and the carrying out of the undermentioned things and of the above conditions shall also be binding and incumbent on me, as it is incumbent according to the *Imamia* law. And for my livelihood my *wasika* and pension are sufficient."

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That pension amounted, as is admitted, to somewhere under Rs. 40 per month. Power is given for collection of the income of all property conveyed, such collection to rest only in the general agent, who was one of the trustees.

The document may be described shortly as an *intervivos* conveyance, taking effect *de presenti* and stripping the lady of all her possessions, except to the extent of the reservation made to herself of her pension of Rs. 40 per month. It appears to their Lordships that the deed accordingly is of a character justifying a strict and careful application of the rule operating for the protection of *purdanashin* women and demanding affirmative proof on the subject of their intelligent understanding and execution of deeds attributive to them. This view is strengthened by the marked contrast which exists between this document of 1902 and the previous deed of endowment of 1898, which was limited in its scope, was purely testamentary, and expressly reserved power of management of all the affairs of the endowed property to the lady herself, with power of amending and cancelling the endowment.

" According to the principles which have always guided the courts in dealing with sales or gifts made by ladies in such a position (*purdanashin* ladies) the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them, that the transaction was a a real and *bonâ fide* one and fully understood by the lady whose property is dealt with."

This is the language of Sir Montagu Smith in *Tacoordeen Jewarry* v. *Nawab Syed Ali Husain Khan*[1] and is still the law. In the words of Sir Andrew Scoble in *Shambati Koeri* v. *Jago Bibi*[2].

" It is a well-known rule of the committee that in the case of deeds and powers executed by *purdanashin* ladies, it is requisite that those who rely upon them should satisfy the court that they have been explained to and understood by those who executed them."

Accordingly, the one and only question in this case is :—the burden of proof being thus placed, has it been discharged by the party upon whom it rests ? In Their Lordships' opinion, Mr. DeGruyther was justified in founding upon the concurrent findings in fact of the courts below. The Subordinate Judge, having heard the evidence, says :—

" It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal and knew at the time its effects upon her rights as owner of the property comprised in the deed."

It is unnecessary to go into the details as to the alleged execution of the document in the zenana, as to whether certain witnesses knew the voice of the executant, as to whether the deed in point of

1. (1874) L. R. I. I. A. 192 206. 2. (1902) L. R. 29 I. A. 131.

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fact was read in circumstances giving any indication of its appreciation by the grantor. The finding of the Subordinate Judge is as stated. In the judgment passed by the Court of the Judicial Commissioner of Oudh the opinion expressed was as follows:—

"It has not been proved that when Mehdi Begam executed the *Wakfnama* she understood its provisions or its effects upon her interests."

By Sec. 596 of the Civil Procedure Code (Act XIV of 1882) it is specifically provided as follows, with reference to appeals to His Majesty the King in Council:—

"Where the decree appealed from affirms a decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law."

Their Lordships put to the learned Counsel for the appellants what question of law was here involved, and it was replied that, while the findings of fact were concurrent the judgment of the Subordinate Judge showed that he had misdirected himself. It turned out that this was rested upon the ground that in the course of a long judgment certain materials for arriving at a conclusion had not been set out in the narrative which the judgment contains. These materials were of the most elementary character, and Their Lordships are of opinion that there is no ground for the suggestion that the Subordinate Judge had not taken them into account. It would be to misconstrue entirely the provisions as to concurrent findings in fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive, under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed.

The Courts below accordingly having concurrently found that the facts which it lay upon the appellants to establish were not proved, it appears to their Lordships that this is to all intents and purposes a concurrent finding on a matter of fact, and that accordingly such a finding cannot be disturbed. The rule so clearly laid down by Lord Macnaghten in *Karuppannan Servai* v. *Srinivasa Chetti*,[1] should be followed.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors:—*W. W. Bax & Co.* for appellants.

Solicitors:—*T. L. Wilson & Co.* for respondents.

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1. (1901) L. R. 29 I. A. 39.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the Chief Court of Lower Burma.]

Present:—Mr. Ameer Ali, Lord Macnaghten, Lord Atkinson, Lord Shaw and Sir John Edge.

Moosa Goolam Ariff and others ... ... *Appellants.*

v.

Ebrahim Goolam Ariff and another ... ... *Respondents.*

Moosa Goolam Ariff *v.* Ebrahim Goolam Ariff.

Companies Act—Certificate of incorporation—Conclusive proof of validity —Civil Procedure Code. S. 11 Expl. IV—" Might and ought."

The certificate of incorporation by the Registrar under the Company's Act is conclusive for all purposes; and when once the certificate of incorporation is given, nothing is to be enquired into as to the regularity of the prior proceedings.

Peels Case,[1] *Oakes* v. *Turquand*[2] approved. *National Debenture and Assets Corporation*[3] dissented from.

Plaintiff's father procured the registration of a limited company and conveyed all his properties to the said Company. Plaintiff first brought a suit to set aside his father's will which deprived him of the father's estate. On the same being dismissed he brought a second suit for declaring the invalidity of the incorporation of the company. All the facts on which the second suit was based were known to the plaintiff and were stated at length in the proceedings of the first suit. No further evidence would have been needed. Nothing was wanting in the first suit except the addition of an issue on the point of incorporation.

Held that the case fell within *Kameshwara Prasad* v. *Kaj Kumari Ruttun Koer*[4] and was barred by *res judicata* S. 11 Expl. IV.

Appeal from judgment and decree, of the Chief Court of Lower Burma on its Appellate Side, reversing a judgment and decree of the same Court on its Original Side, in favour of the present appellants.

Buckmaster, K. C. and *McCarthy* for appellant.

Bailhache, K. C.. and *Snowden* for respondents.

Their Lordships' judgment was delivered by

Lord Macnaghten :—The record in this case is more than ordinarily confused and the story is somewhat complicated. But for the purpose of this appeal the material facts may be stated in a few sentences.

26th June 1912.

1. (1867) L. R. 2 Ch. App. 674.
2. (1867) L. R. 2, Ex. 1 App. 325.
3. (1891) L. R. 2 Ch. 505.
4. (1892) L. R. 19 I. A. 234.

Moosa Goolam Ariff *v.* Ebrahim Goolam Ariff.

One, Hadjee Goolam Ariff, a wealthy Mahomedan merchant, residing at Rangoon, being dissatisfied with the conduct of his two elder sons was minded to dispose of the bulk of his property for the benefit of his two junior wives and his five younger children who were all minors at the time. With this object he applied for and obtained five separate orders under the Act of 1890 for the appointment of one and the same person as guardian of each of his minor children in order that the children by their guardian might accept the benefits which he intended to confer upon them. Being also desirous that his property should remain in one mass, intact and undistributed, he procured the registration of a Limited Company called the Goolam Ariff Estate Company, Limited. To this company in return for share there was transferred so much of his property as was retained by him together with the undivided shares in his estate which he had conveyed to his junior wives and his minor children.

Hadjee Goolam Ariff died on the 15th of May 1902, having made his will on the 19th of the previous month. It was proved by his eldest son, Ebrahim Goolam Ariff, one of the executors therein named on the 23rd June 1902. From that time to the present there has been continuous and persistent litigation in which Ebrahim Goolam Ariff has endeavoured to set aside the disposition which his father made. In all these attempts Ebrahim Goolam Ariff failed except in his Appeal in the present suit to the Chief Court of Lower Burma. On that appeal the order was made from which the present appeal to his Majesty has been brought.

The object of the present suit was to have it declared that the Goolam Ariff Estate Company, Limited, was not duly incorporated and that the property conveyed to the Company should be transferred "to the persons entitled to the same." The validity of the conveyances to the testator's junior wives and his minor children had been established in a suit, No. 146 of 1902, which ultimately came before this Board. But the validity of the incorporation of the Company had not been expressly determined.

The main grounds of defence to the present suit were.—

1. That the certificate of incorporation of the Company was conclusive; and

2. That the question raised by the suit was "*res judicata.*" The questions framed to meet these points were both answered by the Court of Appeal in favour of the plaintiffs. In Their Lordships' opinion both ought to have been answered in favour of the defendants, who are the present appellants.

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In dealing with the first question their Lordships will assume that the conditions of registration prescribed by the Indian Companies' Act were not duly complied with, that there were not seven subscribers to the memorandum of association, and that the Registrar of Companies ought not to have granted a certificate of incorporation. As a matter of fact a certificate of incorporation was granted. In their Lordships' opinion the certificate of incorporation is conclusive for all purposes.

The provisions of the Indian Companies Act of 1882 as regards the incorporation of companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in Sec. 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the memorandum are competent to contract. Probably this provision was introduced because according to the Indian Law the contract of an infant is not voidable but void and it would lead to endless confusion and expense if the Registrar were to take upon himself the duty of ascertaining whether the signatories to the memorandum were or were not of full age.

In England the question whether the Registrar's certificate is conclusive was decided so far back as 1867 by Lord Cairns sitting in the Court of Appeal. In *Peel's* Case [1] after signature and before registration a proposed Memorandum of Association had been altered without the authority of the subscribers so materially that in the words of Lord Cairns, "the alteration entirely neutralised and annihilated the original execution and signature of the document." The Company, however, was registered and the Registrar gave his certificate of incorparation. It was objected that the Memorandam of Association had not been signed by seven or indeed by any subscribers and that the provisions of the Act had not been complied with. To that proposition Lord Cairns assented. But "the certificate of incorporation," he said "is not merely a *prima facie* answer but a conclusive answer to the objection......... When once the certificate of incorporation is given nothing is to be enquired into as to the regularity of the prior proceedings." That was a plain and direct decision on the point. The observations of Lord Chelmsford in *Oakes* v. *Turquand*[2] are to the same effect. "I think," said his Lordship, "that the certificate prevents any reference to prior matters essential to registration, amongst which is the subscription of a Memorandam of Association by seven persons, and that it is conclusive in this case that all previous

1. (1867) L. R. 2 Ch., App. 674. 2. (1867) L. R. 9 E. & 1 App. 325.

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requisites had been complied with." Undoubtedly Lord Cairns' decision has been cavilled at. For instance *In re National Debenture and Assets Corporation*,[1] a judge of first instance declined to treat a certificate of incorporation as conclusive which had been, as was supposed subscribed by six persons only. On appeal, however, further evidence was admitted and it was found that the memorandum had in fact been subscribed by seven persons. On that ground the Court of Appeal reversed the the decision appealed from. But unfortunately the learned Judges of Appeal made some observations to the effect that if the learned Judge had been right as to the facts his decision in point of law would have been correct. The observations were mere *dicta* and besides the Court of Appeal could have no jurisdiction to reverse Lord Cairns' decision. In their Lordships' opinion that decision is of unquestionable authority untouched by any subsequent decision and unimpaired by any *dictum* in any superior court, although the legislature thought fit, no doubt for good reasons, to set the matter at rest by the Imperial Act of 1900, which put the words of Lord Cairns and Lord Chelmsford in a legislative enactment repeated in the Imperial Act of 1908.

Their Lordships are prepared to go further and to say that, in their opinion even if there were no authority to guide their decision the matter would seem to them to be absolutely plain on the words of the Act. The use of the word "otherwise" in S. 6 shows that the statutory condition that the Memorandum of Association must be signed by seven persons is as much a condition of registration as any other requisite to be found in the Act which is preliminary to registration, and apparantely essential.

This view is sufficient to determine the case in favour of the appellants, but inasmuch as the question of *res judicata* was very fully argued their Lordships do not think it right to abstain from dealing with it.

S. 13 of the Code of Civil Procedure of 1882 enacts that:—

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

Then Expl. 2 of that section declares that:—

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

1. (1891) L. R 2 Ch. 505.

Moosa Goolam Ariff v. Ebrahim Goolam Ariff.

It was admitted by the learned counsel for the respondents that the alleged invalidity of the incorporation of the Goolam Ariff Estate Company, Limited, might have been made a ground of attack in the Suit No. 146 of 1902, in which the validity of the dispositions made by Hadjee Goolany Ariff was attacked.

That it ought to have been made a ground of attack in that suit appears to their Lordships to be equally clear. All the facts on which the present suit is based were known to the plaintiff and are stated at length in the proceedings of the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point. The case is plainly within the ruling of this Board in the case of *Kameshwar Prasad* v. *Rajkumari Ruttun Koer.*[1]

Their Lordships therefore think that the question raised in the present suit is *res judicata,* and on that ground as well as on the ground that the certificate of incorporation is conclusive, their Lordships think that the suit fails and ought to be dismissed.

Their Lordships are therefore of opinion that the appeal ought to be allowed and the suit dismissed with costs both here and below and their Lordships will humbly advise His Majesty accordingly.

Solicitors : Bramall and White for appellants.

Solicitors : A. H. Arnold and Son for respondents.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Justice Abdur Rahim.

Krishnasami Panikondar (died) and another Suppammal *alias* Sonammal. } *Petitioners.*

v.

S. R. M. A. R. Ramasami Chettiar and others. *Respondent.*

Krishnasami Panikondar v. Ramasami Chettiar.

Civil Procedure Code. S. 110—Privy Council—Leave to appeal—"Affirming the decision"—Order dismissing the appeal as out of time—Appeal from order —Questions involved in—Admission Court's order admitting appeal out of time not conclusive.

An order the result of which is that the lower court's decision stands unaltered as a result of the disposal of the appeal from it, is an order affirming the decision of the lower court within the meaning of S. 110, Civil Procednre Code.

An order dismissing an appeal as out of time is an order affirming the decision of the lower court; and the question in appeal from the order so

1. (1892) I. L. R. 20 C. 79 (P. C.)

*C. M. P. No. 1152 of 1909. 1st August 1912.

Krishnasami Panikondar v. Ramasami Chettiar.

dismissing the appeal will be only about the order of dismissal and cannot be said to involve a substantial question of law.

The order of the admission court admitting an appeal presented out of time without notice to the opposite side can be objected to by the respondent at the hearing of the appeal itself.

Petition praying that in the circumstances stated therein the High Court will be pleased to grant a certificate entitling the 2nd petitioner to appeal to His Majesty in Council against the order of the High Court in Appeal No. 163 of 1905 and C. M. P. No. 1603 of 1908.

T. V. Sehagiri Aiyar and *Ryru Nambiar* for petitioners.

T. Rangachariar, S. Srinivasa Aiyangar and *T. Rangaramanujachariar* for respondent.

The Court made the following.

Order:—This application is for a certificate entitling the applicant to appeal to His Majesty in Council from an order of this Court, dated the 4th November 1908, dismissing an appeal on the ground that it was not preferred within the period prescribed by the Limitation Act. In that order the Court gave its reasons for declining to exercise the power to excuse delay conferred by S. 5 of the Limitation Act and dismissed the appeal with costs.

Taking it in the applicant's favour that this order is a final order passed on appeal by the High Court (S. 109 (*a*) Civil Procedure Code), we are of opinion, none the less, that the applicant is not entitled to the certificate applied for.

In the first place we think the order of this Court is an order affirming the decision of the Subordinate Judge within the meaning of S. 110 of the Code. We think that the right view of this question was taken in *Beni Rai* v. *Ram Lakhan Rai*[1] and that an order the result of which is that the lower court's decision stands unaltered as a result of the disposal of the appeal from it, is an order affirming the decision of the lower court. This view receives some support from the decision of the Privy Council in *Tassadug Rasul Khan* v. *Kashi Ram*[2] where it is pointed out that what has to be affirmed is the decision and not the judgment, though no doubt that case is not entirely on all fours with the present case.

The order therefore being an affirming order, we have to see whether a substantial question of law is involved in the appeal. We think there is none: it is conceded that there is no question of law dealt with by the order appealed from; but it is urged that that

1. (1898) I. L. R. 20 A. 367. 2. (1902) I. L. R. 25 A. 109.

Krishnasami Panikondar v. Ramasami Chettiar.

order itself is contrary to law because a learned Judge of this Court had in an exparte order dated 31st July 1905 excused the delay and admitted the appeal.

No objection was taken at the time of the hearing by the Division Bench to the competency of the Court to determine the respondent's objection based on limitation and it has always been the practice of this court to hear such objections and determine the question of limitation irrespective of the order made without notice to the respondents.

In these circumstances we should not be justified in holding that this contention involves a substantial question of law.

Then it is contended that the case in the court of first instance involved a substantial question of law and that inasmuch as if their Lordships held that the order of this court was wrong it will be within their competence instead of directing this court to hear this appeal to go on and determine it themselves therefore the appeal must be held to involve a substantial question of law. We think this is not so: the appeal is from an order of this court which decides that the appellant has precluded himself from calling in question the decree of the Subordinate Judge and we think though not without some doubt that the only question that can properly be said to be involved in that appeal is the question whether that order is right or wrong.

We must dismiss the application with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

Messrs. Arbuthnot & Co. Insovent Debtors represented by the Official Assignee of Madras. ... *Appellant**

v.

A. Sabapathy Mudaliar ... ... *Respondent*

Messrs. Arbuthnot & Co. v. Sabapathy Mudaliar.

Insolvency Act—(Presidency) S. 73—Computation of time for Appeal—Money held in trust—Money held in fixed deposit in insolvent's own name though paid for the security of an employee.

In computing the period of limitation under S. 73 of the Indian Insolvency Act, if the last day of limitation for filing the appeal falls on a holiday for the Court, the time during which the court was closed should be computed in favour of the appellant; and consequently, an appeal filed on the re-opening day is in time.

* O. S. A. No. 21 of 1909. *18th April 1912.

Messrs. Arbuthnot & Co. v. Sabapathy Mudaliar.

Held also that the amount paid in by the employee of the Insolvent Company and held in fixed deposit by the latter in their own name was not money held *in trust*.

Appeal from the order passed by the Hon'ble Sir Charles Arnold White, Chief Justice, in the Insolvency Jurisdiction in the notice of motion of A. Sabapathy Mudali in I. P. No. 181 of 1906.

T. V. Seshagiri Aiyar for appellant.

K. Ramanath Shenai instructed by *Short* and *Bewes* for respondent.

The court delivered the following

Judgment:—A preliminary objection has been raised that the appeal is out of time as the order was made on the 8th April 1909 and the appeal was not filed within one calendar month as required by section 73 of the Indian Insolvency Act, 1848. The vacation in that year began at the end of April, and the appeal was filed on the re-opening day of July. As regards this point we are not prepared to differ from *Aruvamudu Ayyangar* v. *Samiappa*[1] *Sambasiva Achari* v. *Ramaswami Reddi*[2] and *Hajee Ismail Sait* v. *The Trustees of the Harbour, Madras*[3] a series of rulings which appear to have been generally accepted and acted on for a period of some years.

We therefore hold the appeal is in time.

The appeal relates to the sum of Rs. 1000 which the petitioner as Head Godown keeper was required to deposit with Messrs. Arbuthnot & Co., as security on his appointment as Head Godown keeper and which he paid in on 18th April 1906. In his affidavit he merely states that it was taken from him as security for the performance of his duties it being understood it should be returned to him when he left the service. The Official Assignee reports that it was placed by the firm in fixed deposits in the name 'Ourselves account of security for A. Sabapathy Mudali as godown keeper." The Official Assignee adds that the usual procedure of the firm was so to deposit security money at 5 per cent, and the interest would, we think, in due course have been paid to Sabapathy or credited to his security account if the insolvency had not supervened before interest was payable.

The Official Assignee suggests the petitioner must have been aware of the manner in which his security money was dealt with, but the learned commissioner observes that there is no evidence

1. (1897) I. L. R. 21 M. 385. 2. (1898) I. L. R. 22 M. 179, 181.
3. (1900) I. L. R. 23 M. 389.

Messrs. Arbuthnot & Co. v. Sabapathy Mudaliar.

that this was ever communicated to him, and has allowed the claim. With great respect we think the principle laid down in *Official Assignee of Madras* v. *Smith*[1] is applicable and that the relation of debtor and creditor should be deemed to have come into existence between the bank and the petitioner in respect to this payment unless good reason is shown to the contrary. We think no such reason has been shown and that the proper inference is that the money was dealt with in the way according to the usual practice and with the petitioner's assent. We think he would have far preferred the investment of the money in what was then unfortunately a favourite security to the same left idle. With great respect we are constrained to differ from the learned commissioner and must allow this appeal and dismiss the petition with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Gudimetla Venkatarazu ... *Appellant. (2nd Defendant.)*

v.

Bollozu Kotayya ... *Respondent. (Plaintiff).*

Venkatrazu v. Kotayya.

Hindu Law—Daughter's estate—Alienation for maintenance—"Necessity"—Maintenance of destitute widowed daughter a legal obligation on family of birth—Chastity how for a qualification and a bar for female's inheritance.

A Hindu daughter has not less power in reference to the estate she inherits from her father than a Hindu widow would have in the estate inherited by her from her husband and an alienation made by the daughter for purposes of her maintenance is binding on the reversion.

Per *Sadasiva Aiyar*, J.—*Obiter*:—There is a legal obligation on a Hindu father and his family to support a destitute daughter of the family even though married if she could not get sufficient provision from her deceased husband's family for her maintenance.

Bai Mangal v. *Bai Rukmani*[2] dissented from.

The words "necessity" and "legal necessity" and their meaning dwelt on.

Chastity as a qualifieation for inheritance in the case of several Hindu female heirs considered.

The Smriti Law and the present state of Hindu Law in regard to the position of women and their legal rights considered.

Second Appeal from the decree of the Court of the Subordinate Judge of Cocanada in Appeal Suit No. 148 of 1909, presented against the decree of the District Munsif of Cocanada in Original Suit No, 585 of 1908.

P. Narayana Murthi for appellants.

B. Narasimha Row for respondent.

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1. (1908) I. L. R. 32 M. 68.

2. (1898) I. L. R. 23 B. 291

S. A. No. 360 of 1911. 24th July 1912.

Venkatrazu v. Kotayya

Miller J.

Judgments:—*Miller,* J.:—In my opinion the appeal must be allowed. I have had the advantage of reading the judgment which my learned brother has prepared and in which he has set out the facts, and agreeing in his conclusion I desire only to make a few observations.

There is no question that a widow is entitled to provide for her own maintenance by alienating a portion of her inheritance, if she cannot provide for it otherwise. The Subordinate Judge holds that a daughter's powers are more restricted apparently because the widow has a claim on her husband's estate during his life-time and a daughter has no such claim against her father once she is married.

I do not suppose that the Subordinate Judge intended to suggest that it is a rule of Hindu Law that the rights of an heir in the estate of an ancestor to whom he has succeeded, are in direct proportion to his claims against the property during the life-time of the ancestor. My learned brother demonstrates the baselessness of any such idea. I think the Subordinate Judge means rather to suggest that the origin of the widow's succession to her husband is her right to be maintained by him, and consequently she has a right to get her maintenance out of the property inherited, whereas the origin of the succession of a daughter to her father is different.

If this is his meaning, I am unable to hold that his premises are sufficiently well established to serve as a safe foundation for a differentiation between the legal rights of the widow and those of the daughter. The passage which he quotes from Mayne's Hindu Law contains some suggestions by Mr. Mayne of a possible reason why the daughter was not allowed to take an estate equal in extent to that of the son, but they are put forward only as suggestions based on general principles of religious efficacy and not as based on any statements of ancient writers; and Mr. Mayne does not suggest that the daughter's rights are or ever were less than the widow's in law. And finally if it be suggested that the right to maintenance gives an equity to the widow which the daughter has not, that consideration would apply only to the married daughter, for a maiden daughter has the right of maintenance as against her father and if she is orphaned while a maiden she should have the same rights in the inheritance as her mother would have if she survived her husband. And we have not been referred to any text or decisions which suggests the propriety of drawing any distinction between the extent of the estate inherited from her father by a widowed daughter and that taken by a maiden; nor do I think it was suggested to us that we should now make any such distinction.

The facts make the present case a strong one in favour of the appellant. She had to borrow money to maintain herself while out of possession of the property, and if it was her duty, or her right, to fight the person in possession in order to recover the property, it would seem difficult to see why she was not bound or entitled to keep herself alive for the struggle; if she can charge the estate for the expenses of counsel, for court fees and the subsistence allowance of witnesses, why not for the necessary expenses of the principle combatant. Even the income of the property was withheld from her and by the plaintiff in this case himself.

I would allow the appeal and make the decree proposed in the judgment of my learned brother.

Sadasiva Aiyar, J.—The 2nd defendant is the appellant before this Court in the above Second Appeal. One Ammayalingam died in 1893 leaving a widow and a daughter (1st defendant) as his successive heirs and a divided nephew (plaintiff) who had a contingent reversionary interest in the estate of Ammayalingam, (that is contingent on his surviving 1st defendant's mother and 1st defendant) and subject to all the valid alienation (if any) made by them as female heirs succeeding to the property of a male owner. The suit out of which this Second Appeal has arisen was brought by plaintiff to declare that the alienations made by 1st defendant in favour of the other defendants are not binding on Ammayalingam's estate after 1st defendant's death.

2. 1st defendant's mother (Ammayalingam's widow) died about 1902. 1st defendant was obliged to bring Suit No. 363 of 1905 against the present plaintiff who was in wrongful possession as against her of the plaint property from about 1902. She succeeded at last about 1908 in recovering possession. She had become a widow when a mere girl, her deceased husband's family was evidently unable to maintain her and she had been living as a member of her father's family all along. But during the years when she and her mother were wrongfully kept out of possession of the plaint property by plaintiff she had to borrow moneys from third persons for her maintenance and for the expenses of her litigations with the plaintiff. To satisfy those debts, she executed the mortgage bond Exhibit I, dated 8th April 1908 for Rs. 250 mortgaging 1 acre and 67 cents of plaint lands to 2nd defendant. She and her mother had already sold another 1 acre to 2nd defendant in 1901 and 2nd defendant had sold it in his turn to 3rd defendant (who is plaintiff's own son-in-law). Though the plaintiff sued to establish the invalidity of both the alienations, the contest seems to have been

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confined in the Lower Appellate Court to the alienation by the mortgage-deed of 1908 (Exhibit I) in favour of 2nd defendant for Rs. 520.

3. The Rs. 520 was made up of (*a*) Rs. 220 borrowed by the 1st defendant for purposes binding on the reversioner according to the view of both the Courts, (*b*) Rs. 300 which the 1st defendant was under a necessity to borrow for the 1st defendant's maintenance while she was kept out of possession by the plaintiff of her father's estate.

4. As regards the Rs. 300 the District Munsiff held that the alienation to the extent of this sum of Rs. 300 was also binding on the plaintiff (reversioner). The learned Subordinate Judge on appeal held differently. His reasons might, I think, be thus formulated, using mostly his own language:—

(*a*) Under the Hindu Law, "a daughter who inherits her father's estate cannot charge it for the expenses of her own maintenance."

(*b*) "The case of a widow" who inherits to her husband "is quite different" from the case of a daughter, as the widow "has a claim on the husband's estate both during his life-time and after his death;" whereas the daughter's maintenance is a charge on her husband's estate and is "*not* a legitimate charge on the father's estate in her hands."

(*c*) A daughter inheriting her father's property must "be considered as *holding the property for a special purpose and bound to pass it on intact to next heir with its capacity for performing that purpose undiminished*" "She can only enjoy the income of the property and she cannot alienate it for her maintenance," (*c*1) even if she had been kept out of enjoyment of its income by the reversioner, (*c*2) even if the income was insufficient to maintain herself, and (*c*3) even if she had no other means of support. On this view, the Lower Appellate Court held that Exhibit I executed for Rs. 520 was a legitimate charge on the reversionery right in the mortgaged property only to the extent of Rs. 220 and that Exhibit I was invalid as against the plaintiff's reversionary right to the extent of the remaining Rs. 300.

5. The 2nd defendant (appellant) contends before us that the Rs. 300 charge is also binding on the plaintiff as representing the reversioner and that the Lower Appellate Court's too conservative view of the rights of a daughter over her father's property inherited by her is opposed to Hindu law. The learned vakils on both sides have

ably argued this question of law and after carefully hearing and considering their arguments and the authorities on the subject, I have come to the clear conclusion that the appeal should be allowed.

6. Under the Archaic and Shastraic Hindu Law, no limitations on the power of female heirs existed as *legal* fetters. A wife is so greatly honored by the Shastras that she originally inherited her husband's property even when he had left sons of his body, that is, the husband's property belonged to both husband and wife during their life-time and only after both died could the sons divide their parents' said estate, for, the widow was considered to be the surviving half of her husband and was his indissoluble companion in every religious ceremony and every secular act. Her remaining life-period was a sort of prolongation of her husband's life (see Manu, Chapter 9, slokas 45 and 104—I have given the effect of the plain literal meanings of the texts of Manu without the misleading glosses and additions of Kulluka and the still more misleading commentary of the Smriti Chandrika. The text clearly says that the sons " have no power " over their father's property so long as the mother lives. See also Mayne's Hindu Law Section 245 where it is said that the Ceylon Thesawaleme still follows the ancient Hindu Law preferring the widow to the son). The Sankha and Likhitha Smrithi says (see 2 Dig. 533) that sons are not independent even after their father's death while their mother lives. Narada says the same (Chapter 3 slokas 38, 40). But several later commentators (whose authority ought to be and is admitted by themselves to be less than that of the Rishis who gave the Smrits) have twisted the texts so as to place limitations on the power of female heirs by quoting isolated passages divorced from the context and directed against the general capacity of women and recommending their being always kept in a dependent position, passages similar to those which might be quoted against women from the works of the early Christian Fathers. The restrictions placed upon a woman in the enjoyment of what she inherits, were similar to those sometimes placed upon even a male owner, namely, that he should not alienate even his exclusive property so as to leave his wife and children destitute, (see Mayne para. 460) restrictions intended to be effectuated by moral and social sanctions and not by legal disqualifications. However it is now too late (and therefore useless) to try to restore the old Hindu Law on these questions and we have to rest thankful that at least in Bombay in the cases of inheritance by sisters and daughters and other female heirs who have passed to a different Gotra or are even likely in future to pass by marriage to a different Gotra

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an absolute right has been held to vest in them and not merely what is usually known as "a woman's estate." I do not intend to deal at length with the rather fanciful theory of Mr. Mayne (page 710 of his Book) that the widow's right to inherit arose out of her right to be maintained and I shall merely say that it is almost inconceivable to me that the large legal right of inheritance could have grown out of the inferior right of maintenance and that the development of the law has been rather the other way, the widow's full right of ownership in her husband's property in Vedic times having been cut down in the mediæval ages (the position of Aryan woman having become degraded in mediæval times through the influence of surroundings and through the downward tendancy of all mundane institutions unless vivified and uplifted from time to time) (*a*) to a technical "widow's estate" if her husband left no sons and (*b*) to a small share of the inheritance under the Dayabhaga system if her husband left sons and at the time when the said sons divide the father's property and (*c*) to a mere right of maintenance where the Mitakshara and allied systems prevail. (Whether later customs opposed to the earlier shastras can be valid under the Hindu Law is a large question which again it has now become too late to consider but I might refer to Ghose and Bhattacharya, learned writers who know the Sanskrit texts in their original and who say that customs opposed to the Sruti and Smiriti can never become good Hindu Law).

The attempt of Mr. Mayne to trace the right of inheritance of the daughter to the ancient practice of the father appointing a daughter to raise a son to continue the male line of her father, has not in my opinion, been more successful than his attempt to trace the right of inheritance in the widow to a mere right of maintenance. Slokas 127 to 129 (Manu Chapter 9) merely show the value of a daughter to the extent of even continuing the male line of her father but do not all control the plain meaning of Sloka 130 which rests the right of the daughter to inherit of the simple and intelligible ground that both the son and daughter proceed from the father and are closely united to his life as their physical life proceeded from his (see also Mitakshara Chap. II, Sec. 2, Sloka 2).

7. As I said before it is futile now to attempt to get over the restrictions imposed on female heirs inheriting to males by later writers and by unshastraic customs which have become "settled" law; but surely, it is not obligatory on Courts to make such restrictions more severe than they have been already made by binding precedents. Many Hindus of the northern part of India have adopted the custom of strict gosha for females from the Mussalmans.

Many Mussalmans in Malabar have adopted the Marumakkthayam system of inheritance from association with Malayalee Hindus. But it is surely not the duty of the Courts of Justice to impose on them the burden of the other antiquated practices which they have not adopted simply because the practices already adopted by them might be logically or historically connected with these other practices.

8. In the case of the rights of female heirs who have succeeded to the property of their deceased male relations, I am not at all inclined to advance one inch further in the matter of the imposition of restrictions on their powers to enjoy such property as owners than the Courts have already gone. The current of decisions which sought to interpret unqualified gifts of lands to wives and daughters as giving them only a life interest on the presumed opinion of a Hindu male donor that his female relations are not fit to be trusted with full dominion over any property has happily been turned back in recent times (see *Musilijadu* v. *Nannigadu* [1] *Radha Prasad Mullick* v. *Ranee Dassee* and *Peary Lal Mullick* v. *Ranee Mani Dassee*,[2] *Ramachandra Naiker* v. *Vijayaragavulu Naidu*,[3] *Toolsi Dass Kurmokar* v. *Madan Gopal Dey*,[4] *Atul Krishna Sircar* v. *Sanyasi Churn Sircar*,[5] *Surajmani* v. *Rabi Nath Ojha*.[6] The tendency of recent decisions is to enlarge the rights of Hindu female owners of property and not to restrict them.

9. Now, what are the restrictions on female heirs (inheriting to males) which have already become "settled" law and cannot be now reopened in cases which are treated as governed by the Mitakshara School of law? What are the powers and privileges which have been already allowed to such female heirs by the precedents and which ought therefore to be jealously protected from encroachment? Mr. Mayne says that it is "wholly incorrect" to call the estate inherited by a female heir from her deceased male relation as an estate "for life." "It would be just as untrue to speak of the estate of a father under the Mitakshara law as being one for life. Hindu Law knows nothing of estates for life or in tail or in fee." The texts usually quoted as imposing restrictions on the female heirs' powers are *all texts which relate solely to the widow inheriting her husband's property* and do not apply in terms to other female heirs. By a false analogy, the restrictions have been gradually imposed on other female heirs also, though (as I said before) the daugher and the sister have escaped the penalty of such restrictions in Bombay. Some

1. (1905) 15 M. L. J. 462.
2. (1906) I. L. R. 33 C. 947.
3. (1908) I. L. R. 31 M. 349.
5. (1901) I. L. R. 28 C. 499.
5. (1905) I. L. R. 32 C. 1051.
6. (1907) I. L. R. 30 A. 84.

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acute lawyers (like Raghunandana of the Bengal school) wanted to proceed even further in the game of what I may be permitted to call the baiting of female heirs and wanted to make a daughter, mother and all other female heirs (other than the widow) forfeit their claims of inheritance on the score of unchastity just as a widow is supposed to forfeit hers on that score. They have unhappily succeeded in Bengal (see *Ramnath Tolapattro* v. *Durga Sundari Debi*[1], but have happily failed in Madras and Bombay and the other parts of India. The reason which requires a widow to be chaste at the time of the opening of the inheritance of her husband's estate if she wants to claim the said property of her husband as his heir and which imposes on her after she had inherited as heir the duty to lead an abstemious life the effect of which will necessarily be the preservation of her husband's estate from wasteful alienations, has evidently no applicability to other female heirs and, in my opinion, other female heirs, cannot on any intelligible principle be allowed less powers over what they inherit as theirs than the widow. Mr. Mayne says (para 608) in so many words that the reasoning by which a widow has got limitations placed on her powers of alienating her husband's estate "would not apply to the case of a daughter." Mr. Mayne further says (para 625) that there is " less reason for imposing any such restrictions upon other female heir's than on the widow. The notion that a female heir to a male's property is a trustee for the next succeeding heir of the male is rightly repudiated by all the text writers including Mayne (para. 625) and West and Buhler. She fully owns and represents that estate and the right of the so-called " reversioner" is merely that of a contingent expectancy. It is the Smriti Chandrika and other mediæval commentators expounding narrow, illiberal and even very harsh views that have tried to restrict women's rights more and more. As remarked already, under the ancient sacred texts, the widow inherited *before* her sons who *were to be dependent on her* till her death. Her estate was an absolute estate though she was advised not to be extravagant. That great and unprejudiced scholar Professor H. H. Wilson says (Vol. 5 of his works) " It is absurd to say that a woman was not intended to be a free agent because the old Hindu legislators have indulged in general declarations as to her unfitness for that character......The spirit and the text of the original law, in our estimation, recognize the widow's absolute right over property inherited from a husband in default of male issue." When her rights were afterwards reduced to receive a

1. (1879) I. L. R. 4 C. 554.

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share at the time of the partition among the sons, it was at first held that she had an absolute right over the share she so obtained; by again the narrow views of the commentators who despised the fair sex prevailed. As professor Wilson well puts it. "The old lawyers have said 'Let a widow enjoy a husband's wealth; afterwards, let the heirs take it.' What obligation does this involve that *she must leave it?*" The ancient injunctions addressed to the widow "can scarcely be interpreted to mean that if a widow gives away or sells her estate, such gift or sale is invalid. Even the later writers who entertained less reverence for the female character than the ancient sages have stopped short of such declaration, and Jimutavahana is content to say that 'a widow shall only enjoy the estate; she ought not to give it away, or mortgage or sell it.' He allows her also, if unable to subsist otherwise, to mortage or even to sell it, and to make presents to her husband's relatives and gifs or other alienations for the spiritual benefit of the deceased. It is not till we come to the third generation of lawyers, the commentators on the commentators, that the restriction is positive, and Sri Krishna Tarkalankara, expounding Jimutavahana's text, declares 'a widow shall use her husband's heritage for the support of life; and make donations, and give alms in a moderate degree for the benefit of her husband; but not dispose of it at her pleasure like her own peculiar property.' The utmost that can be inferred from all this is, that originally the duty of the widow was only pointed out to her and she was left, in law as she was in reason, a free agent, to do what she pleased with that which was her own; but that in later times attempts of an indefinite nature have been made to limit her power."

10. I hope I have not wandered too far from the point to be decided in this case in my anxiety to see that whatever restrictions might have already been imposed by "settled" precedents, no fresh restrictions should be imposed on female heirs inheriting to male owners. The "settled" restrictions are:—

(*a*) That on the female heir's death the male owner's next heirs and not the female heir's own heirs succeed to the property which she has inherited and which has not been validly disposed of by her.

(*b*) That she cannot alienate the *corpus* of the inheritance except for special purposes, those special purposes coming under the comprehensive word "necessity" including "religious or charitable purposes or those which are supposed to conduce to spiritual welfare."

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11. Now the word "necessity" is a word of wide import and as is usual with words of wide import, there is a certain amount of uncertainty and vagueness attached to its full content. But it seems to me that it is impossible to argue that the maintenance of the heir herself is excluded from the meaning of the word "necessity" unless the heir is the widow of the deceased owner. I cannot conceive of a greater "necessity" than the maintenance of the connection between body and soul by the securing of food, raimant and other things called "necessaries." The gist of the learned Subordinate Judge's argument in the case is that the word "necessity" is not intended to apply to the "necessity" of the heir herself but to the spiritual "necessity" of the deceased male owner or the "necessity to preserve his estate for the benefit of the next succeeding heir after the female heir, the said female heir being treated as a mere trustee, who is permitted as a matter of grace to enjoy the bare income, however small and insufficient for her maintenance. I am unable to agree with the position that the female heir's highest and most pressing legal "necessity" is not to support herself and that she is bound to starve herself on account of another supposedly more imperious necessity, namely, that of preserving the estate intact for the reversioner. That a widow as heir could alienate her husband's property for her own maintenance is fully conceded. (*Sadashiv Bhaskar Joshi* v. *Dhakubai.*[1]) But it is argued that the married daughter who succeeds as heir has got a lesser right as she had no such claim on her father's estate during his life-time for her maintenance as the widow had. Is it not strange that while in Bombay, the Gotra sapinda female heirs like the sister and daughter who have gone off into the families of other Gotras, are allowed a larger estate on that very ground it should be argued in Madras that the latter heirs have got less powers of disposal than the widow and the mother because these latter, as belonging to the Gotra of the deceased, had a right to maintenance from the deceased's estate during his life-time? However, the patent fallacy of the argument lies in confounding the extent of the rights of an heir *who has succeeded* to an estate and *after* he or she so succeeded with his or her rights in that estate *before he or she so succeeded as heir.* The two sets of rights have absolutely nothing to do with each other. A remote Bandhu of the 14th degree or even the circar might inherit a man's property with full power of disposal after he or the circar so succeeds and yet the heir or the circar have never a shadow of right to be maintained out of the estate during the life-

1. I. L. R. 5 B. 450.

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time of the propositus. To try to impose greater restrictions on the daughter than on the widow *as heir after the succession opened* because of their (real or supposed) different rights *before* the succession opened seems to me to be not based on any intelligible principle. A man is bound to maintain his unmarried sister out of his ancestral property and is not bound to maintain a divided 14th cousin; and yet when he dies, the 14th cousin might inherit absolutely the property while the sister should be content with a marriage portion and even if she inherits, she would have much less power of disposal than the male cousin of the 14th remove if he succeeded. In short, the bringing in of such foreign considerations as the right to maintenance seems wholly irrelevant and misleading.

But even assuming for argument's sake (I do not concede it except for the purposes of argument) that unless the daughter had some claim on her father's estate for her maintenance her powers of disposal as heir of her father cannot extend to the finding of means for meeting the supreme necessity of procuring her own "necessaries," has not a widowed destitute daughter whose husband's family is unable to give her anything, has she not a legal claim on her father for her maintenance at least when she lives with him as a member of his family? Has she not, at least, a social and moral claim against her father which ripens into a legal right against his estate after his death just as in the case of a daughter-in-law who has only a social and moral claim against her father-in-law if he has no ancestral property and whose moral claim becomes a legal claim after his death? (See *Rangammal* v. *Echammal*[1].) The authorities are all in favour of the existence of such a right in the destitute married daughter except one doubtful decision in *Bai Mangal* v. *Bai Rukhmini*[2]. J. C. Ghose says (Hindu Law, pages 295 and 296) "The law of Narada is clear, that when the husband's family is in destitute circumstances, the father's family has to maintain a female. It is difficult to see how it is only a moral duty......When the father's family marry a girl to a poor man...how can it be said that when she becomes helpless on account of the indigence of the husband's family the father's family can turn her out without a maintenance? ....According to the strict letter of the Hindu Law and also according to the nature of the constitution of Hindu Society, it is a clear *legal duty* on the part of the father's family to maintain a woman under the circumstances noted above." And then the learned author proceeds to criticise *Bai Mangal* v. *Bai Rukhmini*[2] and says that that decision "is not correct according to the old law of the

1. (1898) I. L. R. 22 M. 305. 2. (1898) I. L. R. 23. B. 291.

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Rishis." Mr. Mayne was formerly of opinion that if the husband's family "are unable to support" a married daughter "she must be provided for by the family of her father" and he was supported by Macnaghten (Vol. 2, page 118) and West and Buhler (233, 245, 248 and 437) and 2 Strange (pages 83, 90). Mr. Mayne, however, seems to have changed his opinion after the decision in *Bai Mangal* v. *Bai Rukhmini*.[1] The learned Judges who decided that case while finding on the question of fact that "it is not clear that she" (the daughter) "is absolutely without any provision," proceeded to lay down that even if she was destitute, there was only a social and moral obligation and not a legally enforceable right by which her maintenance can be claimed against her father's family and even though she had returned to live with her father and brother after she became a widow. With the greatest deference to the very learned Judges (Justices Ranade and Parsons) who decided the case in *Bai Mangal* v. *Bai Rukhmini*.[1] I must regretfully express my dissent from that decision and I concur in the opinion of J. C. Ghose, West and Buhler, Macnaghten, and Strange that there *is* a legal obligation on the father and his family to support a destitute daughter (though she had been married away) if she could not *get* sufficient provision from her deceased husband's family for her maintenance. Bhattacharya also says (page 400) that under the Hindu Law texts, widowed daughters are entitled to maintenance and "justice requires that their right should be recognized." The argument that by marriage she becomes a member of another family and becomes, so to say, "dead" to her own family is merely carrying legal fictions to absurd lengths. A wife is half her husband's body but you cannnot on that account give double rations to the husband for his meals and give none to the wife; nor does the daughter lose her consanguineness, blood relationship to her father and her right of inheritance to him and other similar rights, simply because she becomes attached by Pinda, Gotra and Sootaka to her husband's family by marriage.

As I said before, the question of the daughter's right to maintenance during her father's life-time is irrelevant in the consideration of the question of the extent of her powers *as heir to his estate*. She cannot have less powers than the widow. Their Lordships no doubt say in *Tatayya* v. *Ramakrishnammah*,[2] "under the Hindu Law in force in this Presidency, the daughter's......powers of alienation......are no greater than those of the widow" but they immediately add "and we are inclined to hold *that they are not less*."

1. (1898) I. L. R. 23 B. 291. 2. (1910) I. L. R. 34 Mad 288.

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That learned Hindu lawyer J. C. Ghose says, however, that "the peculiar circumstances under which the widow's right came to be recognized and limited did not exist in the case of the daughter and the mother.......*The daughter was like a son* when she took her father's inheritance and *there is no justification for limiting her rights in any way*" (" or for holding that in her case but not in the case of the son, virtuous life was a condition precedent to her taking"). I am, however, content to take it for the purposes of this case that the daughter's powers are neither greater nor less in extent than the widow's powers and even in that view, the alienation to the extent of Rs. 306 borrowed by the 1st defendant for the necessaries of her maintenance is binding on the whole estate of the father.

As against the observations in *Bai Mangal* v. *Bai Rukhmini*[1] (which are almost in the nature of *obiter dicta*), we have the direct authority of the decision of the Allahabad High Court in *Rustam Singh* v. *Moti Singh*[2] where it was held that a daughter inheriting to her father was entitled to mortgage her father's estate to meet the expenses of the marriage of her own daughter and that the meeting of such expenses was a " necessary purpose" justifying the alienation. No elaborate reasons are given in the above decision, evidently because the learned Judge felt no doubt on the question of law. The father was under no legal obligation to provide for his daughter's marriage and yet it was held that that the debt incurred by his daughter for expenses of such marriage, was binding on the reversionary heir. Surely the daughter's own maintenance is a more imperious necessity than the grand-daughter's marriage.

In the result, the appeal must be allowed, the decree of the Subordinate Judge set aside and the District Munsiff's decision restored with costs against the plaintiff and in favour of the 2nd defendant in this Court and in the Lower Appellate Court.

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1. (1898) I. L. R. 23 B. 291.
2. (1896) I. L. R. 18 A. 474.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

Maharaja of Bobbli ... { *Decree holder—Plaintiff.* Appellant Petitioner.

v.

Sree Raja Narasaraju and another } *Judgment—Debtors (Defendants)* Respondents.

Maharaja of Bobbli *v.* Raja Narasaraju.

Limitation Act Art. 182—Cl. 4—Step in aid of execution—Application in accordance with law—Transfer of decree for execution from District Court to Munsiff's Court—Attachment by Munsiff's Court—Application for sale to District Court whether application in accordance with.

A decree may be executed simultaneously in more than one court; but the court that passed the decree should permit concurrent execution before it is so carried out: and in the absence of such permission, the court to which, the decree is transferred for execution is the proper court which is seized of the execution of the decree.

A District Court passed the decree in the case. The decree was transferred for execution to a District Munsiff's Court subject to the control of the District Court which passed the decree and in the same district. The decree-holder got certain immoveable properties attached by the District Munsiff's Court in 1905. In 1907 a petition for sale, of the properties attached by the Munsiff was made to the District Court; and the petition prayed for notice under S. 248 Civil Procedure Code (XIV of 1882) and nothing further was done. A subsequent petition was filed in 1910 for execution.

Held:—That though the petition of 1907 in so far as it prayed for notice was a step in aid of execution, yet it was not made to the proper court and consequently it could not give a fresh starting point for execution from its date within Art. 182 of the Limitation Act.

Appeal against the order of the District Court of Vizagapatam, dated 25th day of October 1910, in E. P. No. 15 of 1910 (in O. S. No. 11 of 1903.)

L. A. Govindaraghava Aiyar and *V. Ramesam* for appellant.

B. Narasimheswara Sarma for respondent.

The Court delivered the following

Judgment :—The question is whether the plaintiff's application is barred by limitation. The plaintiff obtained a decree in O. S. No. 11 of 1903, on the file of the District Court of Vizagapatam. The decree was transferred to the District Munsiff's Court of Parvatipur for execution on the 3rd of October 1904. The decree-holder got certain immoveable properties attachedb ut the petition was dismissed, on the 10th of March 1905 and no further steps were taken in the District Munsif's Court. The decree-holder then applied to the District Court

A. A. O. No. 64 of 1911. 2nd May 1912.

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at Vizagapatam on the 13th December 1907 for the sale of property attached by the District Munsif. The petition was returned for amendment under Sec. 235 of the Code of Civil Procedure of 1882. It was re-presented without amendment and was then recorded without being registered. The decree-holder makes this present application on the 21st April 1910 for notice and for the realization of the amount by sale of the properties already attached. The question whether the last application is barred by limitation depends upon the question whether the application of the 13th December 1907 to the District Court was in accordance with law and to the proper Court.

The application of the 13th of December 1907 prayed for notice under Sec. 248 of the Civil Procedure Code of 1882 and the decision of the District Judge that such application must be treated as a step-in-aid of execution is in accordance with the decision in *Pachiappa Achari* v. *Poojali Seenen*[1].

The only question that remains therefore for decision is whether the application is made to the proper court. The District Judge decides that the proper Court to which the application should have been made was the District Munsif's Court of Parvatipur to which the decree had been transferred for execution and that therefore the present application is barred. Under Sec. 223 of the Cvil Procedure Code of 1882 (Sec. 38 of the present Code) the Munsif's Court of Parvatipur to which the decree was sent for execution has to certify to the District Court of Vizagapatam the fact of such execution or if the Munsif's Court fails to execute the decree the circumstances attending such failure. Till that is done the Munsif's Court retains its jurisdiction to execute the decree. See *Abda Begam* v. *Muzafar Husain Khan*[2]. There is no doubt therefore that the Munsif's Court had jurisdiction to entertain a similar application for execution in 1905. This was not denied in argument before us.

The next question is, whether that is the only court to which this application could be made or had the District Court also jurisdiction to order the sale of the property. Under Sec. 38 of the Civil Procedure Code of 1908 (Sec. 223 of the Code, Act XIV of 1882) the decree may be executed either by the Court which passed or to which it is sent for execution. This in itself does not authorise the District Court of Vizagapatam which passed the decree to execute it after it had been sent for execution to the Munsif's Court of Parivatipur. Sec. 39 states the condition under which a decree may be sent to

1. (1905) I. L. R. 28 M. 557. 2. (1897) I. L. R. 20 A. 129.

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another court for execution. Under Cl. (*c*) it may be sent for execution to another court if the court directs the sale or delivery of immoveable property situated within the limits of the jurisdiction of the court to which it is sent for execution. The reason for the transfer of this case is plain enough. By Cl. (*a*) it may also be sent to another court if the judgment-debtor resides there or carries on business or work for gain within the limits of the jurisdiction of that court. Under Cl. (*b*) if the judgment-debtor has no property within the jurisdiction of the court which passed the decree sufficient to satisfy the decree and has property within the limits of the jurisdiction of the court to which it is sent, the decree may be sent to that court for execution. Under Cl. (*d*) of Sec. 39 if the court which passed the decree considers for reason which shall be recorded in writing that the decree should be executed by another court, then also the decree may be sent to another court for execution. This section does not say that after the decree has been sent to another court for execution, the court passing the decree may not simultaneously carry on execution proceeding, but it is plain enough that Sec. 39 intends that it is only for special reason that the decree should be sent to another court for execution. Thus, if there is sufficient property by the sale of which the debt may be realised ordinarily, no Court would be justified in sending the decree to another Court for execution. At the same time it is quite possible that concurrent execution may be necessary. If for instance a property within the jurisdiction of this Court which passed the decree is comparatively not of much value, and the property within the jurisdiction of the Court to which the decree is sent is also not comparatively of much value then there can be no injustice to the judgment-debtor in carrying out the execution proceedings in both the Courts. If the decree sent for execution to two or more Courts to be executed at the same time the amount realised in the aggregate may be much higher than the judgment-debt, it would manifestly be an injustice to the judgment-debtor to allow the execution proceedings to go on at the same time. Furthermore, if the full amount of the decree is realised by two or three courts it is difficult to see how matters can be worked out—which of the sales is to be held valid and on what grounds, and, what interests would be acquired by the purchasers at those sales. It is true the judgment-debtor may apply for stay of execution proceedings under Order 21, Rule 26 but he is not entitled to get the execution proceedings stayed. While therefore these sections may not show that concurrent execution cannot be carried on, they certainly show that such execution should be allowed only in exceptional circumstances. It is only when

such execution is necessary in the interest of the decree-holder and when it can be carried on without hardship to the judgment-debtor that it ought to be allowed by the court which passed the decree. The other provisions show that such court apparently retains control over the execution proceedings. When the decree has to be executed against the representative of the judgment-debtor then according to Sec. 50 the application has to be made to that court which passed the decree. When the decree has to be executed at the instance of the assignee of the decree-holder then also the application has to be made under Order 21, Rule 16 to the same court. Then again, power is given to such court to stay the execution proceedings in the court to which decree is sent for execution. When therefore concurrent execution is necessary the court which passed the decree may order it. But such order is passed and permission is given to the decree-holder to execute the decree simultaneously in more than one court, he is not entitled to carry on execution proceedings at the same time. The decision seems to be one of this view. In *Sarada Prasada Mullick* v. *Lachmipat Singh Doogur*,[1] their Lordships of the Privy Council held that it was open to a court to send the decree for execution to three courts at the same time. This decision was passed under Civil Procedure Code of 1859. It may be pointed out that under Sec. 286 of that Code, the court was bound to transmit the decree for execution to another Court, " unless there be special reasons to the contrary ;" under the Codes of 1882 and 1908 it is optional with the court to send it to another court. Under Sec. 284 of the Code 1859 their Lordships pointed out that when the decree is sent for execution to another court conditions may have to be imposed upon the decree-holder. This also shows the necessity of the exercise of judicial discretion. In the case in *Kristo Kishore Dutt* v. *Rooplall Dass*[2] also, there was an order by the court which passed the decree for simultaneous execution. These decisions are authorities for the proposition that decree may be executed simultaneously in more than one court; but in all these cases there were orders allowing such execution and the consideration that I have already set out would seem to indicate the necessity of permitting concurrent execution before such execution proceedings can be carried out. In the present case after the decree was transferred for execution to Parvatipur Munsif's Court that court *had* the ***seisin*** of the execution proceedings and it was bound to carry them out until execution was obtained or further execution became impossible. There was no order of the District Court of Vizagapatam staying execution in that court for the purpose of executing the decree in

1. (1872) 14 M. I. A. 529 at 540. 2. (1882) I. L. R. 8 C. 687.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Pallagani Sreeramulu ... ... *Petitioner Appellant*

v.

Raja Venkata Rangayya Appa Row Bahadur Garu. ... ... *Respondent.*

Madras Estates Land Act Ss. 19, 3, (Cl. 2), 77, 189—Suit by landholder for rent due on Kamatam or private land—Forum—Jurisdiction of Civil Courts.

A suit for rent due to a landholder in respect of his *Kamatam* or private land is cognizable by a Civil Court and not by the Collector's Court.

Sreeramulu *v.* Rangayya Appa Row

Appeal under Section 15 of the Letters Patent against the judgment of His Lordship Mr. Justice *Ayling*, in C. R. P. No. 432 of 1910 against the decree of the Court of the Principal District Munsif of Bezwada in Small Cause Suit No. 1770 of 1909.

P. Nagabhushanam for appellant.

V. Ramesam for respondent.

The Court delivered the following

Judgment:—*Miller*, J. —I do not think we can differ from the finding that that the land is Kamatam land. In that view the question whether the District Munsif had jurisdiction, depends ultimately on the proper construction of Section 19 of the Estate Land Act. It is contended before us that the phrase 'the relations between a landholder and a tenant of his private land' cannot properly be held to include the right to sue for rent and the liability to be sued for it; and it was urged that these 'relations' are the conditions of the tenants' tenures as set out in Chapter III of the Act. I do not find that this narrow construction is necessary; the phrase can without impropriety be construed to include all the mutual rights and obligations of the landlord as such, and his tenant as such; in the absence of anything to indicate a contrary intention, I should be disposed so to construe it. I find nothing to indicate a contrary intention and on the other hand, as my learned brother has shown in the judgment which he has prepared and which I have had an opportunity of reading the intention of the framers of the Act appears to have been by Section 19 to exclude the Collector's Court as the forum in which were to be instituted suits for rents by a landholder against a tenant of his private land.

Finding then no reason to exclude the provision of S. 19, I agree with my learned brother that there is no provision of this Act which 'specially provides' for the institution of the suits for rent by

L. P. A. No. 78 of 1911. 24th April 1912.

Sreeramulu v. Rangayya Appa Row

a landholder against a tenant of his private land; and it follows that the forum in which such suits are to be instituted is not regulated by the Act and a suit in a Civil Court is not prohibited.

The appeal therefore fails and we dismiss it with costs.

Sadasiva Aiyar, J:—This is a Letters Patent Appeal and the only question seriously argued on the appellant's behalf was whether in respect of Kamatam or private lands (*i.e.,*) lands not coming under the head of "ryoti" and as defined in S. 3, Cl. (16) of the Madras Estates Land Act, a suit for the rent by the landlord against the tenant of such lands is excluded from the jurisdiction of the Civil Court when S. 3, Cl. (II), 77 and 189 and the schedule part (A) No. 8 of the Estates Land Act, are read together. S. 3, Cl. (II) defines "rent" as whatever is lawfully payable to a landholder for the use of land in his estate for the purpose of agriculture. S. 77, Cl. (I) empowers the landholder to institute a suit before the Collector for the recovery of "arrears of rent." S. 189 says "A Collector or other Revenue Officer etc" shall hear and determine all suits of the nature specified in parts A and B of the schedule and no Civil Court in its original jurisdiction shall take cognizance of such suit." The schedule part (A) No. 8 refers to suit by landlords to arrears of rent. It seems to me clear that if these provisions alone are considered, the present suit is excluded from the jurisdiction of the District Munsif who has tried it on the Small Cause Side.

(2). But the respondent relies on Section 19 of the Act which is is as follows:—

"Except as otherwise specially provided in this Act, the relations between a ryot and his tenants or between a landholder and a tenant of his private land and the rights of any other owners of land, are not regulated by the provisions of this Act." Such special provisions expressly applying the provisions of the Act to the relations between a landholder and a tenant of his private land appear in Ss. 134 and 158 of the Act? Can we say that it is "specially provided" by S. 189 (read with S. 3 (11); 77 and A No. 8) that the relations between the landholder and the tenants of his private lands in the matter of the forum in which a suit for rent by the landholder against such a tenant should be brought are regulated by the provisions of that S. 189? I feel grave doubts on that point. Having regard to the express reference in Ss. 134 and 158 to "a tenant of private land" and to the positive provisions in those sections regulating some of the relations between such a tenant and the landholder, I do not think that the mere omission to mention, in S. 189 and to exclude expressly a suit for rent against such a tenant of

private land from the operation of S. 189 could be treated as a special positive provision making that section regulate the relations between the landholder and a tenant of "private" land in the matter of the forum in which the landholder should bring his suit for rent against such a tenant.

3. I am glad to find myself supported in this view by proceedings before the Legislative Council when the Act was being fashioned in the legislative anvil. Ss. 77 and 134 of the Act occur in the same Chapter VI of the Act and correspond to Clauses 67 and 124 (A) of the bill. Sub-clauses 1 and 2 of Clause 124 (*a*) of the bill (corresponding to Sub-clause (1) of S. 134 of the Act) refer to one of the relations between a landholder and the tenant of his private land and to the similar relation between land-owners under the ryotwari tenure and their tenants. The Advocate-General in moving an amendment to Clause 124 (A) said "It was not intended that these other landowners specified in Clause 1 and 2 should be debarred from instituting suits in the Civil Courts. The provisions of this chapter are a little too wide and Clause 67 is one of the provisions of this chapter. Under that clause, Sub-clause 1, the provision is "the landholder may institute a suit before the Collector for the recovery of arrears," so that the result of the enactment under Clause 124 (A) as it stands will be to require landholders mentioned in Sub-clauses (1) and (2) also to *institute suit for arrears of rent before the Collector. That was not intended.*" The Advocate-General then by his amendment introduced words which (he thought) made a contrary intention clear, evidently holding that the clause in the bill corresponding to Sec. 19 of the Act will prevent recourse by the landholder to the revenue courts for recovery of rent against the tenants of his private lands after Clause 124 (A) is amended as proposed by him, (the Advocate-General) by the addition of some words. Honble Mr. G. S. Forbes in seconding the amendment of the Advocate-General said "that was clearly the intention of the original bill and the Council, that those other landholders should have a right for the recovery of rent by these *processes. It was never intended to give them right to sue before the Collector.*" The remedies of a land-holder against the tenant of his private land and of a ryotwari landlord against his tenant for the recovery of rent were intended to be placed on the same footing and the latter can of course, sue only in the ordinary Civil Court for rent, though he can in certain cases, use the processes mentioned in Sec. 134 for recovery of arrears of rent.

4. In the result the appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Hyderman Kutti and another ... ... *Appellants.**

v.

Syed Ali and another ... ... *Respondents.*

Hyderman Kutti *v.* Syed Ali.

Mahomedan Law—Guardian defacto—Powers of sale—Essentials—Imperative necessity or necessary benefit

According to Mahomedan Law, a *defacto* who is not a *de jure*, guardian of a minor can alienate the property of the minor only in cases of urgent and imperative necessity and in cases which must, in their very nature, be necessarily beneficial to the minor.

A sale effected by the mother of a Mahomedan minor for defraying the expenses of the minor's sister's marriage or for the discharge of family debts is not binding on the minor.

Second Appeals from the decrees of the District Court of South Malabar at Palghat in Appeal Suit Nos. 1030 of 1909 and 53 of 1910 presented against the decrees of the District Munsif of Palghat in O. S. Nos. 248 of 1908 and 4 of 1909.

In S. A. 1416 of 1910.

T. R. Ramachandra Iyer and *T. R. Krishnasami Aiyar* for appellants.

C. V. Anantakrishna Aiyar for respondents.

A. Nilakanta Aiyar for appellant in S. A. 1639 of 1910.

C. V. Anantakrishna Aiyar for respondent in Do.

T. R. Ramachandra Aiyar for appellant: sale by a *defacto* guardian for necessary purposes is binding upon the ward even under the Muhammadan Law. Sircar Vol. I, p. 484, Ameer Ali, Vol. II, p. 476. *Hasan Ali* v. *Mehdi Husain*,[1] *Majidan* v. *Ramnarayan*,[2] *Mafazzal Hosain* v. *Basid Sheikh*,[3] *Ramcharan Sanyal* v. *Anukul Chandra Acharyya*,[4] *Hurbai* v. *Hiraji Byramji Shanja*,[5] S. A. 1443 of 1907. A. S. 15 of 1908.

The view taken in *Pathumabi* v. *Vittil Ummachabi*,[6] has been considerably departed from in this court as is to be seen from the cases above referred to. *Moyne Bi* v. *Banku Behari Biswas*,[7] has been considered by Rampini J. who was a party to it not to militate against the view taken in the later cases. Cf. also *Ummi Begam* v. *Kesho Das*.[8]

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* S. A. No. 1416 of 1910 and S. A. No. 1639 of 1910. 13th April 1912.

1. (1877) I. L. R. 1. A. 533.
2. (1903) I. L. R. 26 A. 22.
3. (1906) I. L. R. 34 C. 36.
4. (1906) I. L. R. 34 C. 66.
5. (1895) I. L. R. 20 B 116.
6. (1902) I. L. R. 26 M. 734, 738.
7. (1902) I L. R. 29 C. 473.
8. (1908) I. L. R. 30 A. 462.

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C. V. Anantakrishna Aiyar for respondent submitted that a *defacto* guardian was unknown to Muhammadan Law. See the observation of *Mir Ameer Ali* from the Bench.

Baba v. *Shivappa*,[1] *Sitaram* v. *Anur Begam*,[2] *Nizamuddin Shah* v. *Ananda Prasad*,[3] *Hamir Singh* v. *Mussi Zakia*,[4] *Pathumabi* v. *Vittil Ummachabi*,[5] *Durgozi Row* v. *Fakeer Sahib*,[6] *Abdul Khader* v. *Chidambaram Chettiyar*[7] *Bhutnath Dey* v. *Ahmed Hosain*,[8] *Mussamut Bakshan* v. *Mussi Dookhin*.[9] He cited S. A. 553 of 1902.

Even a guardian can sell immoveable property only under limited circumstances; see *Kali Dutt Jha* v. *Abdul Ali*,[10] citing Macnaghten's Principles of Mahomedan Law, Ch. VIII, Cl. 14. An heir in adverse possession of the deceased's estate cannot as pointed out by *Sir Bhashyam Aiyangar* J. in *Pathumabi* v. *Vittil Ummachabi*[5] sell property in discharge of debts not in the capacity of *defacto* guardian but in his own right. For authorities in support of this position, see *Hamir Singh* v. *Musst Zakia*[4]. The confusion between the two positions has led to *Hasain Ali* v. *Mehdi Husan*.[11]

The Court delivered the following

Judgment:—*Abdur Rahim* J.—In both these appeals one common question arises whether the sale of a minor's property by his mother acting as *defacto* guardian is valid under the Mahomedan Law and if so, under what conditions. In one case Appeal No. 1416, the sale deed alleges that the shop which was sold has been vacant as the municipality prohibited the selling of fish and flesh in that shop, that it was in a dilapidated condition and the mother of the minor who is the 8th defendant was unable to execute repairs. The sale proceeds it is alleged were applied to the discharge of certain debts contracted for the marriage of a sister of the minor and for other purposes. It was to meet the expenses of the marriage that money was required and the other facts mentioned apparently furnished the reason for selecting this particular property for sale. In Suit No. 4 of 1909 which has given rise to S. A. No. 1639 of 1910 the allegation in the plaint is that the minor's mother who was managing the family affairs and maintained the children, utilised the money obtained by sale of certain mortgage rights belonging to the minor for the

1. (1895) I. L. R. 20 B. 199.
2. (1886) I. L. R. 8 A. 324.
3. (1896) I. L. R. 18 A. 373.
4. (1875) I. L. R. 1 A. 57.
5. (1902) I. L. R. 26 M. 734.
6. (1906) I. L. R. 30 M. 197.
7. (1908) I. L. R. 32 M. 276.
8. (1885) I. L. R. 11 C. 417.
9. 3 B. L. R. A. C. 423.
10. (1888) I.L.R. 16 C. 627 (P.C.)
11. (1877) I. L. R. 1 A. 533.

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discharge of proper family debts and for other family necessity. The Court of first instance and the Appellate Court relying on the authority of *Pathumabi* v. *Vittil Ummacha*,[1] *Durgaji Row* v. *Fakir Sahib*[2] and *Abdul Khader* v. *Chidambaram Chettiar*,[3] have held in both the suits that the sales even if the allegation as to the purpose be true would not be binding on the minor in Mahomedan Law.

The decisions of the Courts on the question how far the mother or other near relative of a minor who is not a guardian of the minor according to Mahomedan Law with respect to his property but has the custody and upbringing of the minor is authorized to alienate the minor's property are more or less conflicting. There are two decisions of the Privy Council on the question which must be noted first; one of these is reported in *Kali Duttjha* v. *Abdul Ali*.[4] That was the case of a guardian and with respect to his power their Lordships of the Judicial Committee approved of the statement of the law as contained in 'Macnaghten's Principles of Mahomedan Law' Chapter VIII Cl. 14 but they upheld the transaction in question in that case on the ground that there was a dispute as to the title of the minor to the property and therefore the rule laid down in Macnaghten did not apply, and also, on the ground that the sale was for the benefit of the minor. In *Mata Din* v. *Sheikh Ahmed Ali*[5] the sale was effected by the minor's mother who was custodian of the minor's person and was in possession of the property, in order to pay certain debts binding on the minor and their Lordships held that a person by *de facto* guardianship may assume important responsibilities towards the minor though he cannot clothe himself with the legal power to deal with the estate. They declared the sale to be not binding although it was made for the payment of an ancestral debt as it was not made of necessity nor was beneficial to the minor inasmuch as the facts of the case showed that the sale of the property was necessary. It is not clear what their Lordships' decision would have been if the sale was made of necessity or was for the benefit of the minor. Another question was raised before the Judicial Committee in that case *viz.*, whether a sale under the circumstances found there would be void or voidable. Their Lordships reframed from deciding that question. It should also be noted that one of the members of the Committee, Mr. Syed Ameer Ali observed with some emphasis during the argument that there was no warrant in the Mahomedan Law for sale by the mother of minor son's immove-

1. (1902) I. L. R. 26 M. 734.
2. (1906) I. L. R. 30 M. 197.
3. (1908) I. L. R. 32 M. 276.
4. (1888) I. L. R. 16 C. 627.
5. (1912) 16 C. W. N. 338.

Hyderman Kutti v. Syed Ali. — Abdur Rahim, J.

able property even for necessity; but though much weight must of course be attached to the observation it cannot be said that the decision of their Lordships was based on such broad and general grounds. In this court it was held in *Pathumabi* v. *Vittil*[1] that the principles of the Hindu Law relating to alienations by the mother of a Mahomedan minor although the sale for the purpose of paying ancestral debts by a co-heir in possession of all the effects of the deceased, if *bona fide*, would be binding on the other co-heirs. The principle of the ruling has been followed in *Durgoji Row* v. *Fakir Sahib*[2] and *Abdul Kadir* v. *Chidambaram Chettiar*[3]. In none of these cases was any definite opinion expressed on the general question, how far an alienation by a *def acto* guardian which is made for necessity and for the benefit of the minor is valid. Nor was this question decided in Second Appeal No. 1443 of 1907 an unreported judgment of Mr. Justice Benson and one of us. It was held in *Aliyamma* v. *Kunhumad*[4] that a guardian's powers in respect of immoveable property of the ward are very restricted in Mahomedan Law and that urgent necessity or clear benefit to the ward must be shown before an alienation by the guardian could be upheld. In laying down this proposition the learned Judges followed the Privy Council ruling already mentioned (16 Cal.) and certain decisions of the Bombay and Calcutta High Courts.

In the Calcutta High Court the law seems to be in a somewhat uncertain state. The earlier decisions confine within very narrow limits the powers of the *de facto* or *de jure* guardian in dealing with a Mahomedan minor's property while in more recent decisions this view has undergone considerable modification. In *Musamat Bakshun* v. *Musamat Doolhine,*[5] a sale by a guardian of a minor's property was held not to be permitted by the Mahomedan Law except for urgent necessity. In *Bhutnath Dey* v. *Ahmed Hosain,*[6] a mortgage by a person purporting to act as guardian was held to be void as it was not shown that the money raised by the mortgages and utilised for paying arrears of rent could not have been raised otherwise than by mortgaging the minor's property. Similarly in *Morjna Bibi* v. *Banku Behari Biswas,*[7] Justices *Rampini* and *Pratt* set aside a sale by a *de facto* guardian because such a person has no authority to deal with the minor's estate, doubting whether even if the sale was for the manifest advantage of the minor it could be

1. (1902) I. L. R. 26 M. 734.
2. (1906) I. L. R. 30 M. 197.
3. (1908) I. L. R. 32 M. 276.
4. (1911) I. L. R. 34 M. 527.
5. 12 W. R. 337.
6. (1885) I. L. R. 11 C. 417.
7. (1902) I. L. R. 29 C. 437.

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upheld under the Muhamadan Law. In *Mafazzal Hosain* v. *Basid Sheikh*[1] however *Rampini* and *Woodroffe* JJ. decided that a sale for urgent necessity in order to pay the debts due by the deceased and for the maintenance of the minor was valid in Mahomedan Law· Mr. Justice *Woodroffe* was inclined to place the validity of such transaction also on the grounds of justice, equity and good conscience inasmuch as it was not made out that it was prohibited by Mahomedan Law. It should be noted that the learned Judges distinguished the decision in 29 Calcutta on the ground that it was not shown that the transaction was for the benefit of the minor. Chief Justice *Maclean* and Mr. Justice *Caspersz* in a case reported in *Ram Charan Sanyal* v. *Anukul Chandra Acharjee*,[2] followed the ruling of *Rampini* and *Woodroffe* JJ. in the last mentioned case and held that a sale by the mother as a *defacto* guardian of his minor son is good and valid if it is found to have been made *bona-fide* for the benefit of the minor. Referring to the case in 29 Calcutta they pointed out that the effect of that ruling is considerably modified by the ruling in I. L. R. 34 C. 36. In fact, however, they have laid down a broader proposition than what forms the basis of *Rampini* and *Woodroffe* JJ's judgment in I. L. R. 34 C. 36 placing the ruling on general grounds of justice, equity and good consicence. But with all deference to the learned Judges there can be no doubt that the question must be determined in accordance with the provision of Muhamadan Law. Moreover it is difficult to see how a man who chooses to buy a minor's property from a person who has no power to deal with it however *bona fide* his action may have been, can invoke any principle of justice and good conscience to support the transaction itself though no doubt such consideration may be a good ground for the Court refusing to render any help to the minor when he seeks to recover the property except on the condition of his restituting whatever benefit he has derived from the transaction. The other principle indicated in the decision of *Rampini* and *Woodroffe* JJ. and in other rulings *viz.*, that in Mahomedan Law urgent necessity and benefit of the minor is a justifying cause of such a transaction though the person who acted on behalf of the minor had no legal authority of a guardian seems to be a more intelligible ground and requires careful consideration.

In the Allahabad High Court in *Hassan Ali* v. *Mehdi Hasain*,[3] a sale by the mother was upheld on the ground that it was made for necessary purposes, namely, the payment of ancestral debts and the charge of maintaining the minor. In *Hamir Singh* v. *Musam-*

1. (1906) I. L. R. 34 C. 36. 2. (1906) I. L. R. 34 C. 65.
3. (1877) I. L. R. 1 A. 533.

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mat Zakia [1] a Full Bench of that Court held that a decree duly obtained against one heir who is in possession of the entire estate of the deceased is binding on the minor. In *Sitaram* v. *Amir Begam*,[2] there are certain general observations of Mr. Justice *Mamood* to the effect that the powers of alienation such as those enjoyed by Hindu widow are not known to the Muhammadan Law, a Muhammadan widow being merely a co-heir with her childern and has not the authority of a guardian with respect to their property and Chief Justice Edge, in *Nizamuddin Shah* v. *Anandi Prasad*,[3] set aside a mortgage executed by a Muhammadan minor's uncle, which was apparently not created for necessity on the ground that he had no power of alienation over the property.

The decisions of the Bombay High Court were brought to our notice; *Baba* v. *Shivappa*[4] and *Hurbai* v. *Hirajee Byramjee*[5]; in the first case a sale by the mother professing to act as guardian of her minor son was set aside although it was made to discharge certain debts of the minor's deceased ancestor, and in the other case a mortgage by the mother was declared not to be binding as it was made neither for absolute necessity nor for the benefit of the minor. Both rulings enunciated the general principle that a mother, not being a legal guardian cannot bind the estate of the minor by any act of hers.

In this state of rulings it becomes necessary to examine the text books on Muhammadan Law to ascertain how a transaction which is entered into by a person who is not the legal guardian but is in fact acting as guardian is regarded in Muhammadan Law.

We may take it that the powers of such a person cannot be recognised by the law. The question is whether they have any power at all to bind the minor's estate or rather in what circumstances if any, the dealings of a *de facto* guardian with the minor's estate will be upheld. It seems to us to be quite clear from authoritative pronouncement of Muhammadan Jurists as well as upon the principles of Muhammadan Jurisprudence that while the general rule is that the dealings with such a person do not *ipso facto* bind the minor, the law recognizes certain exceptions to this rule. The exceptions are mainly based on the principles of Muhammadan Jurisprudence that necessity is a valid ground for relaxing a strict rule of law and the application of the principle in cases where a minor has no legally appointed guardian seems to be well recognized. The author of Hedaya (see Hamilton, Grady's Edition) in laying down that a person

1. (1875) I. L. R. 1 A. 57.
2. (1886) I. L. R. 8. A. 324. at 330.
3. (1896) I. L. R. 18 A. 373.
4. (1895) I. L. R. 20 B. 199
5. (1895) I. L. R. 20 B. 116.

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who has the protection of an orphan may lawfully take possession of gift made to the orphan in order to make the gift valid, observes "acts in regard to infant orphans are of three descriptions. 1. Acts of Guardianship, such as contracting an infant in marriage, or selling or buying goods for him; (here, we may point out that the proper translation of the word in the original, namely, '*Ambuvalay Lakena* which is translated as "Goods" should be animals for breeding purposes); a power which belongs solely to the *Walee* or natural guardian whom the law has constituted the infant's substitute in those points. II. Act arising from the wants of an infant, such as buying or selling for him on occasions of need; strictly speaking the translation of the passage in the original Hedaya ought to be "purchase of what the minor cannot do without and sale of it or hiring a nurse for him or the like"; which powers belong to the maintainer of the infant, whether he be the brother, uncle or (in the case of a foundling) the mootakit or take up or the mother provided she be maintainer of the infant: and as these are empowered with respect to such acts the Walee or natural guardian is also empowered with respect to them in a still superior degree; nor is it requisite with respect to the guardian that the infant be in his immediate protection. III. Acts which are purely advantageous to the minor such as accepting presents or gifts and keeping them for him; a power which may be exercised either by a mootakit, brother or uncle and also by the infant himself provided he be possessed of discretion, the intention being only to open a door to the infant receiving benefactions, of an advantageous nature. An infant therefore is empowered in regard to these acts (provided he be discreet) or any person under whose protection he may happen to be. It should be observed that the sale and purchase mentioned as belonging to the 1st category of enumerated transactions which are stated to be within the power of a lawful guardian but not of a person who is not such a guardian but has in fact the custody of the minor are in the nature of transactions entered into for purposes of profit. This text, however, be it also noted here, does not deal with the question under what conditions such sales and purchases by the guardian will be binding on the minor. Stated in plain language the law according to the Hedaya is this: a person who is in actual charge of the property and person of the minor is empowered to do acts which are of imperative necessity having regard to the wants of the infant and acts which by their nature are necessarily advantageous to the infants. Such acts are not confined to dealings with any particular form of property of the minor so far as it can be gathered from the language of the Hedaya and other text-books

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which will be presently noticed and the very principle upon which the validity of such acts is based precludes the idea of any such limitation. The rule enumerated by the Hedaya is accepted as good law by the other jurists of the Hanafi School. *Imam Zeilai* in his well known commentary on Kauz, *viz*, Tabinul Haquars, Vol. 6 at page 34 in the chapter on Sales also states the law in similar terms. He says that the power which the law allows to be exercised over a minor is of three kinds:—"(1) What must be advantageous to the minor and such power exists in all who have charge of the minor, whether guardians or not, for example the acceptance of a gift or alms and such acts can be done by the infant himself if he is of age of discretion; (2) what is absolutely injurious such as divorcing the minor's wife or emanicipating a slave—such authority is not recognised in any one; (3) what is midway between the two that is what may be advantageous or hurtful to the minor such as sale or hiring of property for purposes of profit such power is possessed only by the father, the grandfather, and their executors, whether they have the actual custody of the minor or not, because their power to deal in this manner with the minor's property is by reason of their guardianship. Therefore it is not a necessary condition of the exercise of such power by them that the minor should be in their actual custody. This is how it is stated in *Alkafi.* The hiring of a nurse belongs to the first category; and giving the minor in marriage—this is a power possessed by all *Asha* or paternal kindred as it is usually translated and also by *Zavilarhaih* or distant kindred, in the absence of paternal kindred. None others possess this power.

In *Majuma-ni-amber* which is a commentary of Mooltaka-I-Abhar it is pointed out that, according to Ashshafai and Matik and *de facto* guardian can buy or sell for the minor only with the permission of the judge but the author does not doubt that the Hanafi Law which is the law governing the parties in this suit, is, as stated in the text of Maltaqua in the same terms as in the Hedaya and *Kavz.* It is not necessary to refer to the Arabic text books on this point, as there seems to be no difference of opinion so far as the Hanafi Jurists are concerned and all the text books repeat the statement of the law as cited above. The principle of the rule is also forcibly illustrated in the provisions of Mahammadan Law regarding the powers of an executor in connection with the question whether where more than one executor have been appointed by the testator, one of them can act singly. The general rule is that one of the two joint executors cannot act alone but an exception is recognised in such matters as are of urgent necessity and purely for the benefit of the estate. Thus in the Hedaya (see Hamilton's

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Translation Grayd's Edition, Vol. IV, Chapter VII, Page 699,) the matters in which one of the two joint executors can act singly are thus enumerated—payments of funeral charges or for purchasing victuals or clothes for the infant children of the testator, restoring a deposit, preserving the estate, discharging the debts, acceptance of a gift for an infant, the hiring of a nurse, the selling of goods of a perishable nature, preserving the property of the deceased. In all such matters one of the joint executors is permitted to act alone on two grounds; urgent necessity or clear benefit and advantage to the estate. We may also point out here that according to the general principles of Mahammadan Law sale of a minor's property by an authorized guardian even if it was not made for a valid cause (*i.e*)., of necessity or in circumstances which would make the transaction purely advantageous to the minor would strictly speaking be neither void nor voidable in the ordinary sense of the terms. An alienation of minor's property without any justifying cause is regarded as *Mauguf* or dependent, that is to say its validity will depend upon the minor accepting the transaction on attaining majority. It cannot be said to be operative until it is ratified. It is a transaction in a state of suspense: its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority; the effect of his decision will relate back to the date of the inception of the transaction. If he decides to adopt the transaction it becomes valid from the inception otherwise it will be treated as void and of no effect from the very commencement. Some Hanafi Jurists are inclined to classify such transactions under the head of Sahebe or legally correct transactions on the ground that the subject matter dealt with being fit for the purpose and the parties to the transaction being majors the contract is validly constituted or legally correct, though it will not be operative until the minor on whose behalf the transaction was entered into notifies his assent on attaining his majority. But the question as to the exact nomenclature applied to such a transaction in Muhammadan Jurisprudence is of no substantial importance. All that we are concerned with is its legal effect. (See, Bahrurraig, Vol. VI, Page 78.) The law as regards the effect of dealings with the minor's property by a *de facto* guardian otherwise than in a case of absolute necessity or clear advantage to the minor is but a corrolory of the general rule to sales by a person professing to deal with another's property but without having legal authority to do so (*i.e.*,) by *a furuli* as he is technically called; such sales generally are treated as malikuf or dependent. The subject is discussed in Hedaya, Vol. II, Chapter X section 'of Peroolea Bea or the sale of the property of another without his

consent,' Grady's Edition of Hamilton, page 296, Baille on the Mahammadan Law of Sales, pages 218, 220, 221 and 249; Quadi Khan, Vol. II, page 172 (Original) Tale 'Mulhaquiq, Vol. IV, page 44 (Original) Raddul Mooktar (Original Vol. IV, page 110, Bahrurraig) (Original) Vol. IV, pages 75 and 76; Almajalal (Original) page 53; Fatwa Algamiri, Vol. II, Calcutta Edition, page 255. The result of the above discussion is that according to Mahamadan Juirsts, in case of urgent and imperative necessity, such as those mentioned, the *de facto* guardian can alienate the property of the minor, no distinction being made between moveable and immoveable property. Also such a person can do acts on behelf of the minor which from their nature must necessarily be beneficial to the minor. In either class of cases there seems to be no substantial difference between the power of such a person who has assumed the duties of a guardian without lawful authority and of a legal guardian. But there are other powers which a lawful guardian can exercise which are not in the competence of other persons. It may be observed here, that an act by which the wants of the minor, are met must to the extent be also advantageous to the minor, and that is apparently why some of the writers regard acts done of necessity in the same light as acts which are purely for the benefit of the minor, (See Father Moyeen, Vol. III, Chapter on Abominations, Section Sale, page 410).

It should be pointed out that in Macnaghten's Precedents of Mahomadan Law it is stated in Case 6 at page 171 that a mother who has assumed the guardianship of her minor son cannot exercise any right over the property of the minor. This as a statement of the general rule is undoubtedly correct but the leading authorities as we have shown, recognise certain exceptions to this rule. The case cited by Macnaghten in which a mother sells portion of her minor son's property for resuming the estate and recovers judgment in the suit would seem to be a case of absolute necessity and pure advantage to the minor. Such a sale is however stated to be totally illegal and inadmissible. This would seem to be in conflict with the case in Chapter VII, page 305 where it is laid down that where the uncle of the minor jointly interested in the property sells both his own share and the share of the minor such a sale may be valid under certain circumstances such as when the minor's share is sold for double its value or where there is no means of supporting him without recourse to sale of his property or where the land is in danger of being lost or with a view to save the minor's property from usurpation or when some similar emergency has arisen. At all events according to the authoritative Hanafi Jurists there can be little doubt that the law is as we have stated it and the general

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trend of the decisions of the Courts seems to be substantially to the same effect.

In the present cases neither of the sales were clearly of the character which would be upheld on the ground either of their being made of necessity or being by their nature necessarily beneficial to the minor. The sale which is in question in S. A. No. 1416 was really made to find money for the expenses of the minor's sister's marriage, and neither this nor the ground on which the sale which is in dispute in S. A. No. 1639 is justified, nor the discharge of the family debts and other family purposes, can be said to be justifying causes according to the rule of Mahamadan Law.

In Appeal No. 1416 an objection was taken to the decree which directs the division of the shop in as many as 54 shares on the ground that it does not make any provision for the sale of the shop in case such a division cannot be conveniently effected. But the objection was not taken in the Lower Courts and we are not prepared to hold that such an order, if found to be necessary, cannot subsequently be made by the Court which passed the decree (see *Bai Hirakore* v. *Trikamdas Hirachand*.[1] In Appeal No. 1639 it was argued by the pleader for the appellant that the suit was barred on two grounds. Firstly even if the findings of the courts be accepted that Jamal Muhamad Pulvar the 10th defendant attained majority in January 1906, the suit which was instituted on the 3rd January 1909 was time barred. Plaint is dated 23rd December 1908 but the plaintiff did not apparently file the plaint until 4th January 1909. If the Court re-opened after the Christmas vacation on the 4th January 1908 the suit would be within time and if the objection now taken had been taken in the Lower Court this apparently would have been the answer. The question not having been raised before the Lower Court and being one involving an investigation of facts cannot be entertained for the first time in Second Appeal.

The second ground on which it is contended that the suit is barred is that although the 10th defendant could avail himself of three years time after the attainment of majority, the plaintiff as his assignee cannot be allowed such extention of time. This question again was not raised in the Lower Courts and in the circumstances which are stated in paragraphs 15 and 16 of the judgment of the District Munsiff in Suit No. 248, we do not think we should allow the objection to be raised for the first time here.

The result is both the appeals are dismissed with costs.

Ayling, J. :—I agree.

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1. (1907) I. L. R. 32 B. 103.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph Benson, Officiating Chief Justice and Mr. Justice Abdur Rahim.

Tummala Nagabhushanam ... *Appellant (Plaintiff.)*

v.

Sri Rajah Venkatadri Appa Row Bahadur Zemindar Garu being minor, represented by the Collector of Kistna. } *Respondent (Defendant)*

Nagabhushanam *v.* Venkatadri Appa Row.

Abatement—Suit for wrongful distraint—Maxim—"Actio Personalis moritor cum-persona."

An action for recovery of damages for illegal distraint by a deceased person abates on the death of the distrainor when part of the distrained property was misappropriated by the latter's servant and the rest perished.

The only cases in which apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased who has done the act appear to be those in which the property or the proceeds or the value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys.

Phillips v. *Homfray*[1] referred to.

S. 2 of Act XII of 1855 has no application to a suit instituted against the wrong doer himself in his life time.

Hari Rao Ramadas v. *Ramdas Mathuradas,*[2] *Ramchola Das* v. *Rukmanibai*[3] referred to.

Second Appeal from the decree of the District Court of Kistna at Masulipatam in A. S. No. 240 of 1908 presented against the decree of the Court of the District Munsif at Gudivada in O. S. No. 380 of 1905.

T. Prakasam for appellant.

M. Kunjunni Nair for respondent.

The Court delivered the following

Judgment:—When the allegations in the plaint are carefully considered, the suit must in substance be regarded, as held by the District Judge to be one for recovery of damages for distraint illegally levied by the deceased Zemindar, the original 1st defendant on certain moveables belonging to the plaintiff, some of which either perished or deteriorated owing to the negligence of the Zemindar's servants while the rest was misappropriated by those servants. It cannot be regarded as a suit for recovery of specific moveables appropriated by the original 1st defendant or their value. The nature of the

S. A. No. 1478 of 1910. 7th August 1912.

1. (1883) 24 Ch. D. 439.
2. (1889) I. L. R. 13 B. 677.
3. (1905) I. L. R. 28 M. 487.

Nagabhushanam v. Venkatadri Appa Row.

action being such as we have stated the maxim *actio personalis moritor cumpersona* would apply in the absence of any statutory provisions to the contrary. The scope of this doctrine is thus stated by Bowen L. J. in *Phillips* v. *Homfray*,[1] "the only cases in which, apart from question of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased who has done the act appear to us to be those in which the property or the proceeds or the value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys." In India no doubt this rule of common law has been to some extent modified by Act XII of 1855 which enacts that an action may be maintained against the representatives of a deceased person for any wrong committed by him in his life time for which he would have been subject to an action but as pointed out in *Hari Rao Ramdas* v. *Ramdas Mathuradas*,[2] which has been followed in *Ramchoda Das* v. *Rukhmanibhoy*[3] S. *2* of that Act which provides that no action commenced under the provisions of this Act shall abate by reason of the death of either party has no application to a suit which was instituted against the wrongdoer himself in his life time as such an action could not be said to have been commenced under the provisions of the Act. Such suits are still governed by the rule enunciated in *Phillips* v. *Homfray*.[1]

The appeal is therefore dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Vadivalam Pillai ...	...	... *Appellant.* (Defendant.)
v.		
Natasam Pillai ...	....	... *Respondent.* (Plaintiff.)

Vadivalam Pillai v. Natasam Pillai.

Hindu Law—Joint family—Co-parcener of family property, sale by—Consideration only partly binding on both—Decree—form of,

In the absence of anything appearing to the contrary, the consideration for a sale must be distributed over the whole of the property sold in proportion to the value of each part.

Where one of two co-parceners of a Hindu joint family sells property belonging to both and half the consideration only is found binding on the family. *Held* in a suit by the other co-parcener for recovery of his half share from the vendee, that he would be entitled to recover the same only on

1. (1883) 24 Ch. D. 439.
2. (1889) I. L. R. 13 B. 677.
3. (1905) I. L. R. 28 M. 487.

S. A. No. 1702 of 1910. 16th July 1912.

Vadivalam Pillai v. Natasam Pillai.

payment of his share *i.e.* half, of that portion of the purchase money which went towards discharging debts binding on both.

Marappa Gounden v. *Rangasami Gounden*[1] dissented from.

Second Appeal from the decree of the District Court of Trichinopoly in Appeal Suit No. 34 of 1909 preferred against the decree of the Court of the District Munsif of Srirangam in Original Suit No. 402 of 1907.

T. V. Seshagiri Aiyar for appellant.

T. Natesa Iyer for respondent.

The arguments appear from the judgment.

The court delivered the following

Judgment.—A question of Hindu Law of some importance has been raised for decision in this second appeal. The necessary facts may be very briefly stated. One Manikam and Chinnappa were two Hindu brothers. They were living separate for a considerable time. The plaintiff is the son of Manikam. He sues to recover one-half of certain lands which were sold by Chinnappa in 1898. Evidently the lands in question as well as other property belonging to the brothers were managed by Chinnappa. The plaintiff's case was that he and Chinnappa were undivided members and that the sale made by Chinnappa was not binding on him. He therefore claimed to recover one-half of the properties sold treating the sale of the other half as valid as Chinnappa was entitled to alienate his own share for consideration.

Several questions of fact were raised by the defendant which it is unnecessary to refer to for the purposes of this judgment. The lower Courts found that the family was undivided. The appellate Court also overruled the contention of the defendant that the plaintiff's right to a share of the family properties was extinguished by the statute of limitations ; no good reason is shown for interfering in the second appeal with the finding on this latter question.

Mr. Seshagiri Aiyar argued that the plaintiff was estopped by his conduct from disputing the alienation made by Chinnappa but the finding of the Munsif on the question of estoppel was against him and no facts have been brought to our notice which would show

1. (1899) I. L. R. 23 M. 89.

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that the plaintiff was estopped. The Lower Appellate Court held that out of Rs. 500 the consideration of the sale deed Exhibit VIII executed by Chinnappa, Rs. 250 was borrowed by him for purposes binding on the family consisting of himself and his nephew the plaintiff but that the remaining Rs. 250 was not binding on the plaintiff. On these facts he had to decide what decree the plaintiff was entitled to. He came to the conclusion that the plaintiff was entitled to a decree for the half share claimed by him without making any payments to the defendant. In doing so he considered himself supported by the authority of the decision in *Marappa Gounden* v. *Rangasami Gounden.*[1]

In second appeal it is contended by the learned Vakil for the appellant that the view taken by the Judge is wrong. Mr. Seshagiri Aiyar asks us to proceed on the basis that the amount Rs. 250 which is found to have been borrowed for family purposes must be regarded as a charge on the plaintiff's share of the property. He argues that the family having benefitted to the extent of Rs. 250 by the sale the plaintiff cannot recover his share without paying the amount. In effect he asks us to treat Chinnappa as having sold his own half share for the portion of the consideration which has been held to be not binding on the family and the other half share for the portion held to be binding. Mr. Natesa Aiyar for the respondent asks us to do just the contrary that is, to hold that Chinnappa must be taken to have sold his own half share for the portion of the consideration held binding on the family and the remaining half share for the portion held not to bind the family. We can find no legal principles on which we can adopt either of these courses. According to accepted equitable principles in the absence of anything appearing to the contrary, the consideration for sale must be distributed over the whole of the property sold in proportion to the value of each part. On this principle the whole of Rs. 500 must be distributed over the shares belonging to the plaintiff and Chinnappa respectively. There is no ground for supposing that one portion of the consideration was allocated to a particular half share and the other portion to the other half share. The valid portion of the consideration as well as the invalid portion must be distributed over each of the half shares of the plaintiff and Chinnappa respectively. The result would be that the plaintiff would be bound to pay one-half of the Rs. 250 held binding on the family, that is, Rs. 125 before he can recover possession of the half share claimed by him.

1. (1899) I. L. R. 23 M. 89.

Vadivalam Pillai *v.* Natasam Pillai.

Only one decided case *Marappa Gounden* v. *Rangasami Gounden*,[1] bearing on the point has been brought to our notice namely, the case relied on by the District Judge. That case was in its facts similar to the present one. A Hindu father sold certain property. The sale was held to be invalid but a portion of the consideration was found to have been used for the benefit of the family, namely, for the discharge of the mortgage of the family property. The sale was impeached by the alienor's son. *Subramania Aiyar*, J. held that the son was entitled to recover his half share without repaying any portion of the consideration which was used for the benefit of the family. With great deference to the learned Judge we find it difficult to accept the reasoning on which his judgment is based. He was much influenced by the practical inconvenience which according to him was likely to arise if the alienee was allowed in such a case to claim reimbursement of a portion of the consideration found to be binding on the family. The learned Judge observes "Now a sale of joint property by a co-parcener though made without a legal necessity is in this presidency valid to the extent of the vendor's share. Suppose that that share is really worth the whole of the amount paid by the vendee as the price, why should he get anything more? Next, suppose that that share is really worth less than the price paid, the vendee cannot in such a case reasonably ask for more than the difference between the real value of the share which he gets and the price he has actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy or satisfactory settlement." The whole of this reasoning proceeds on the assumption that when a co-parcener sells his share as well as the share of the other members, the other co-parceners are entitled to raise the question as to what is the real value of the share of the alienor. It cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for a sale will be apportioned between all the items of the properties sold, in case of dispute. There seems to be no reason for allowing the alienor's co-parceners to ask the Court to adopt any other principle. It may be, as observed by the learned Judge, that questions as to valuation are often not capable of easy or satisfactory settlement; assuming it to be so, the right of a co-parcener to sell his own property being now well recognised, the equities as

1. (1899) I. L. R. 23 M. 89.

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between the vendee and the other co-parceners have to be adjusted by the Court in the best manner possible. Nor does such adjustment seem to present any inseparable difficulties. No question is raised in this case of any collusion between the vendee and Chinnappa and it is difficult to find any reason for proceeding on any other view than the principle already enunciated of apportioning the consideration on the whole of the property sold. The learned Judge proceeds to say, "the simpler and better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially such as the present, he must be content with the vendor's share, but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid on the ground that the consideration for the payment failed." It is hardly necessary to say that the remedy proposed might be altogether useless in many cases. On the whole the proper course in this case appears to be to direct that the decree of the Lower Appellate Court be modified by decreeing to the plaintiff a half share in the properties sold by Chinnappa after division by metes and bounds on condition that he pays to the defendants Rs. 125 with mesne profits from the day that he deposits the said amount of Rs. 125 into Court and give notice thereof to the defendants.

The Memorandum of Objections relates only to the form of decree and as we have already dealt with it no further order is necessary. The defendant will pay two-thirds of the plaintiff's costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Narsaya Upada ... ... *Appellant. (Defendant).*

v.

Venkataramana Bhatta ... *Respondent. (Plaintiff).*

Narsaya Upada v. Venkataramana Bhatta.

Limitation Act S. 10, Arts. 134, 142, 144—"Assignee for valuable consideration"—Religious Endowment—Permanent lease—Presumption of title as lessee —No presumption of tenancy from year to year.

A lessee who holds the lands in consideration of an annual payment of rent is an assignee for valuable consideration within the meaning of S. 10 of the Limitation Act, even though no premium was paid at the commencement of the lease.

Arts. 142 and 144 of the Limitation Act are applicable to cases of prescription of limited interests as mortgagee or permanent lessee; *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram*,[1] followed:

* S. A. No. 1723 of 1910. 31st July 1912.

1. (1899) I. L. R. 23 M. 271.

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The trustee of a temple has no beneficial interest in the properties of the temple; and a permanent lessee of the temple properties prescribes title as lessee from the date of the invalid alienation and the prescription is perfected on the lapse of twelve years from the date of the alienation. *Abhiram Goswami* v. *Shymacharan Nandi*,[1] *Iswar Shymachand Jee* v. *Ram Kanai Ghose*,[2] distinguished: *Damodar Das* v. *Lakhan Das*[3] referred to.

When a permanent lease has been found invalid, it is not open to courts to presume a tenancy from year to year from the payment of annual rent. *President and Governors of Magdalen Hospital* v. *Knotts*,[4] commented on.

Second Appeal from the decree of the Court of the Temporary Subordinate Judge of South Canara in Appeal Suits Nos. 124 and 126 of 1909 presented against the decree of the Court the District Munsif of Udipi in Original Suit No. 438 of 1907.

B. Sitarama Row for appellant.

K. Y. Adiga for respondent.

B. Sitarama Row submitted that a lease is a transfer for consideration though no premium is paid and rent is consideration; either the lessee is an assignee or he is not. If he is not an assignee, Sec. 10 has no application, neither the exemption nor the exception. Art. 144 would apply. If he is an assignee, he is an assignee for consideration and the exception would apply. Even then Art. 144 would apply; the starting point of limitation is the date of the permanent lease. A trustee cannot lease permanently. It would be a breach of trust on his part to do so. *Abhiram Goswami's*[1] case is a case where the trustee had beneficiary interest. Similarly *Iswar Shymachand Jee* v. *Ram Kanai Ghose*[2]; else there is no means of reconciling them with *Gnana Sambanda Pandara Sannadhi* v. *Velu*[5]; *Damodar Das* v. *Lakkar Das*.[3] See also *Nilmoney Singh* v. *Jagabandhu Roy*.[6] Mutts' trustees having a beneficiary interest stand on a different footing from mere trustees. See *Vidyapurna* v. *Vidyanidhi*.[7] See also *Pandurang Balaji* v. *Dnyanu*.[8]

K. Y. Adiga for respondent:—*Abhiram Goswami's*[1] case and the case of *Iswar Shymachand Jee* v. *Ram Kanai Ghose*[2] are *ad idem*. There is no means of getting over them. They were held to be clear Debutter cases. He relied upon President of *Magdalen Hospital* v. *Knotts*.[4] Rent having been paid, a tenancy from year to year ought to be inferred *cur ad valt*.

The Court delivered the following:—

1. (1900) I. L. R. 36 C. 1003.
2. (1911) I. L. R. 38 C. 526 (P. C.)
3. (1910) I. L. R. 37 C. 885.
4. (1879) 4 A. C. 335.
5. (1899) I. L. R. 23 M. 271.
6. (1896) I. L. R. 23 C. 526.
7. (1904) I. L. R. 27 M. 435.
8. (1911) I. L. R. 36 B. 125.

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Judgment:—The plaintiff in the suit is the Muktessar or trustee of a small temple in South Canara. The object of the suit is to obtain a declaration that the defendant is not entitled to obtain possession of certain land from the plaintiff on the ground of his being purchaser in execution of a decree which defendant obtained against a third party to whom he had granted the lease and whose rights he brought to sale for the realisation of the arrears of rent due to him under the lease. The defendant had obtained a mulgeni or permanent lease of the land from a former trustee of the temple in the year 1882 and subsequently granted the lease to the person whose rights he brought to sale and purchased in Court auction. Previous to the defendant's suit against his lessee which was in 1906 the plaintiff had obtained possession of the land from the lessee. The plaintiff's contention was that the permanent lease granted by the previous Muktessar was invalid and not binding on the temple. Defendant was admittedly in possession of the land under his permanent lease till 1900, after which time possession was obtained by Phaniappa Vokuda, plaintiff's predecessor in office from the defendant's sub-lessee. The defendant alleged that the permanent lease could not be questioned by the plaintiff after the lapse of so long a time and that he had acquired a permanent lessee's right by prescription. The District Munsif upheld his contention. On appeal the Subordinate Judge Mr. Anantan Nair reversed the Munsif's judgment and held that the defendant could not acquire a permanent lessee's right by prescription as the land was trust property. The defendant preferred a second appeal to this Court. When it first came on for hearing this Court asked the lower Court to record a finding on the question, "Whether the defendant was in possession of the land in question in pursuance of Exhibit II (mulgeni lease) for more than twelve years and whether he acquired a mulgeni right by prescription by such possession, assuming that the mulgeni was invalid at its inception." The present Subordinate Judge has returned a finding to the effect that defendant did hold possession for a period of 18 years under the mulgeni, but that he has not acquired by such possession the right of a permanent lessee. He is of opinion that Section 10 would prevent the defendant from acquiring any prescriptive right, that defendant cannot be regarded as an assign for valuable consideration within the meaning of Section 10 of the Limitation Act as he merely agreed to pay a rent of Rs. 18 (eighteen) per year under the lease but paid no consideration for the grant of the lease itself. He observes further that as the defendant was directed under Exhibit II to pay a sum of Rs. 5 (Rupees five) out of the annual rent of Rs. 18 (Rupees eighteen) towards the

expenses of the *pooja* and other *viniyogas* of the idol of the temple, it may be said that the defendant's possession was not adverse to the idol to whom the property belongs.

The appellant contends that the Subordinate Judge's opinion on the question of limitation is wrong and that the defendant acquired a complete prescriptive title to a permanent leasehold interest by his possession under Exhibit II.

The question for our decision therefore is whether the defendant's possession was adverse to the idol and whether such adverse possession has created a mulgeni right in his favour. Both sides have relied before us on the opinion of the Judicial Committee of the Privy Council expressed in different cases, the appellant relying on *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram*[1] and *Damodar Das* v. *Lakhan Das*[2] and the respondent on *Abhiram Goswami* v. *Shyamacharan Nandi*[3] and on *Ishwar Shyam Chand Jee* v. *Ram Kanai Ghose*[4] that followed it. Before referring to these cases we may make a few observations as to how the matter stands under the provisions of the Limitation Act. Both the parties are agreed that the land in dispute is trust property and that the Muktessar for the time being has no beneficial interest in it at all. Section 10 of the Limitation Act enacts that "no suit against a person in whom the property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property or proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

We are entirely unable to agree with the Subordinate Judge that the defendant is not an assignee for valuable consideration. The payment of rent every year is as much consideration for the lease as the payment of premium at the commencement of a lease would be. The defendant is permitted to hold the land perpetually in consideration of the payment of an annual sum as rent. There can be no doubt that the defendant must be regarded as an assignee for valuable consideration. That being so, the suit against him is not exempted from the operation of limitation by Section 10. What then is the article of the second schedule to the Act applicable to the case? There are only 3 articles which call for consideration, Articles 134, 142 and 144. Article 134 as it stood at the date of the suit and when it was decided by the court of first instance was applicable to a suit "to recover possession of immoveable property

1. (1899) I. L. R. 23 M. 271.
2. (1910) I. L. R. 37 C. 885.
3. (1909) I. L. R. 36 C. 1003.
4. (1911) I. L. R. 38 C. 536.

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conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee." The Privy Council held in *Abhiram Goswami* v. *Shyama Charan Nandi*,[1] that the word purchased does not include anything short of an absolute alienation of title. We must, following this decision, hold that this article is not applicable to the case.

There appears to be no reason for holding that Article 142 is not applicable if the possession of the defendant was adverse to the trust, inasmuch as the plaintiff must be taken to claim the land in his capacity as trustee through his predecessors in office. The trustee or the idol discontinued the possession of the land after the grant of the permanent lease in 1882 and for a period of more than twelve years the defendant continued in possession. If his possession was adverse to the trustee or the idol, then after the expiration of twelve years the right of the idol to possession inconsistent with the defendant's lease became extinguished by limitation. But if Article 142 does not apply, 144 must apply, provided the defendant's possession was adverse. As already stated, the trustee, who granted the lease had no beneficial interest in the property at all, and the lease therefore could not be regarded as valid to the extent of any limited interest that he individually possessed. On the assumption that the lease was not binding on the idol of the temple the defendant's possession was without any valid title at all and must be regarded as adverse to the institution. See *Sailendra Nath Mitter* v. *Karali Charan Singh*,[2] *Nilmony Singh* v. *Jagubhandu Roy*,[3] *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*,[4] *Dattagiri* v. *Dattatraya*,[5] *Narayan* v. *Shri Ramachandra*.[6] It is now settled law that Articles 142 and 144 are applicable where a person in adverse possession has prescribed for a limited interest such as that of a mortgagee or permanent lessee instead of claiming the absolute title to the property. This was the view held by the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*.[4] In that case both the office of manager and the possession of the lands belonging to an idol were alienated by the guardian of the plaintiff in the suit. Their Lordships held that so far as the recovery of the office was concerned Article 44 applied to the case. They then observe "Their Lordships are of opinion that there is no distinction between the office and the property, the endowment, the one is attached to the other. But if there is, Article 144 of the same schedule is applicable. That bars the suit after twelve years' adverse

1. (1909) I. L. R. 36 C. 1003.
2. (1906) 2 C. L. J. 546.
3. (1896) I. L. R. 23 C. 536.
4. (1899) I. L. R. 23 M. 271.
5. (1902) I. L. R. 27 B. 363.
6. (1902) I. L. R. 27 B. 373.

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possession." The same rule has been laid down in cases governed by the English Law. In the *President and Governors of Magdalen Hospital* v. *Knotts* [1] a lease of land belonging to an Elemosynary Corporation was granted for 99 years at the rate of one pepper corn in 1783 by the managers for the time being. The grant was not in conformity with the provisions of the 3rd section of 13 Elizabeth C. 10. The suit was instituted in 1876 for the recovery of the land on the ground that it was not binding on the Corporation. The House of Lords held that the suit was barred. The Lord Chancellor (Earl Cairns) points out the distinction between two classes of cases, one class where the whole property is devoted to the charity and the other class where the head of the Corporation has a personal interest in the property. In the one class of cases the possession would be adverse from the commencement of the possession while in the other class adverse possession would begin only after the death of the head who granted it. His Lordship observes. "It is clear that in the case of an Elemosynary Corporation the whole property of which is devoted to the charity and where the office-bearers and other members of the Corporation have no personal interest whatever, the object must be to make the property of the Corporation absolutely inalienable in any other than by the particular form of lease which is authorised. There is no intention to protect a successor against a predecessor. There is no ground for admitting an intention that individual office-bearers of the Corporation granting the lease should be bound, but that their successors should be free, either to affirm or disaffirm it. The intention is to condemn the lease as a wrong and a viod thing even though every member of the Corporation should have committed himself to it and should be anxious to maintain it." With regard to the 2nd class of cases, "His Lordship observes " Probably they proceed on the principle of a personal estoppel by reason of a personal interest in the head of the Corporation. But they appear to me to have no application to the case before your Lordships." In *Attorney General* v. *Davey* [2] there was a lease in 1726 by the wardens of a Parish Church for 500 years reserving a rent of six prounds per annum. A suit was instituted in 1852 for setting aside the lease and recovering possession. It was held to be barred and that the payment of rent could not be taken to have created a tenancy from year to year. In *Attorney General* v. *Payne*,[3] the managers of a hospital granted a lease for 999 years which was held to be not binding on the institution. The Master of the Rolls (Sir John Romilly) held that possession became

1. (1879) 4 A. C. 325.
2. (1859) 4 De. G. and J. 136.
3. (1859) 54 E. R. 65.

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adverse from the date of the lease to the extent of the alienation contained in the lease. In *Shyamacharan Nandi* v. *Abhiram Goswami* [1] strongly relied on for the respondent the mahant of a shrine of two idols granted a *Mokurari patta* or permanent lease of certain land. The suit for the recovery of the land was instituted long after the period of twelve years had elapsed from the date of the lease. The plea of limitation was set up by the defendant who also alleged that the property was not really *debutter* or dedicated to the idols, but only subject to a religious charge. Sir Andrew Sooble delivering the judgment of the Judicial Committee, after finding that the property was *debutter* and that the lease was not binding on the idols, dealt with the question of limitation. But the only article considered by His Lordship is 134. He observes. "The article in the Limitation Act applicable to this case is Article 134, by which a period of twelve years from the date of purchase is fixed for suits "to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration." His Lordship holds that the expression "purchased" would apply only to an absolute transfer. He then observes "For these reasons their Lordships are of opinion that the leases under which the respondents claim were valid only during the life-time of the Mahant by whom they were granted." In a previous passage His Lordship observes that the lease "on the most favourable construction enured only for the life-time of the grantor, Prananda, who died in 1891." Notwithstanding the finding that the property was *debutter*, their Lordships apparently proceeded on the view that the Mahant who made the grant had, as the head of the institution, a personal interest in the property which would validly pass under the lease. The sanad which was the root of the title obtained by the Goswamis who were the managers of the institution apparently left room for holding that the Mahant for the time being did possess some personal interest. The grantee was to "bestow his blessing on the grantor and to enjoy and possess the property with great felicity." See the judgment of the High Court in the case *Shyamacharan Nandi* v. *Abhiram Goswami.*[2] Again in *Ishwar Shyam Chand Jiv* v. *Ram Kanai Ghose,*[3] the question of the applicability of Article 134 was alone considered and their Lordships merely followed the previous judgment of the Board in *Shyamacharan Nandi* v. *Abhiram Goswami.*[1] Their Lordships observe "whatever might have been the inclination of their opinion, if the

1. (1909) I. L. R. 36 C. 1003. 2. (1906) I. L. R. 33 C. 511.
3. (1910) I. L. R. 38 C. 526.

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matter had been *resintegra* it seems to their Lordships that they would not be justified in reviewing on an *ex-parte* application, the considered judgment of the board delivered after full argument. They will therefore simply follow the decision in *Abhiram Goswami* v. *Shyama Charan Nandi.*[1] They do so with less hesitation because the language of the article in discussion in that case and in this has been altered by subsequent legislation." We are bound to take it that in that case also the judgment of the Privy Council proceeded on the footing that the manager of the institution had a personal interest in the alienated property. *Damodar Das* v. *Lakshan Das*[2] is in our opinion a distinct authority in favour of the appellant. Sir Arthur Wilson, delivering the judgment of their Lordships observed "learned Judges of the High Court have rightly held that in point of law the property dealt with by the *ekrarnama* was prior to its date to be regarded as vested, not in the Mahant, but in the legal entity, the idol, the Mahant being only his representative and manager. And it follows from this that the learned judges were further right in holding that from the date of the *ekrarnama* the possession of the junior *chela*, by virtue of the terms of the *ekrarnama* was adverse to the right of the idol and of the senior *chela*, as representing that idol, and that, therefore, the present suit was barred by limitation." It is no doubt true the case was not argued before their Lordships for the respondent, but the decision is none the less an authority binding on us *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram*[3] and *Nilmony Singh* v. *Jagabandhu Roy*[4] were cited by the appellant's counsel and were apparently accepted by their Lordships as correct. Lord McNaughten who delivered the judgment of the Council in the later case of *Ishwar Shyam Chand Jiv*[5] was a party to this judgment.

On the whole we are of opinion that the cases *Abhiram Goswami*[1] and *Ishwar Shyam Chand*[5] must be taken to have been based on the fact that the alienor possessed an individual interest on which the alienation could operate during his life time.

It was contended by Mr. Adiga for the respondent that as the defendant paid the rent reserved under the permanent lease during his continuance in possession, a tenancy from year to year must be deemed to have been created between the temple and the defendant and he relied on an observation of Lord Selborne in *President and Governors of Magdellen College* v. *Knotts.*[6] The observation

1. (1909) I. L. R. 36 C. 1003.
2. (1910) I. L. R. 37 C. 885 (P. C.)
3. (1899) I. L. R. 23 M. 271.
4. (1901) I. L. R. 23 C. 536.
5. (1910) I. L. R. 38 C. 526.
6. 4 A. C. 335.

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is as follows:—"The other observation which I wish to make is that the present case is one for which there was probably no precedent and which is never likely to be followed by another similar to it a long term having been attempted to be granted by a charitable corporation at a pepper corn rent. If any rent had been reserved and received the legal relation from year to year would have been created and the statutes of limitation could not have run." There is nothing in the judgment of the Lord Chancellor or of Lord Gordon to show that they concurred in these observations. It is opposed to the judgment of the Court of appeal in *Attorney-General* v. *Davey*[1] already referred to. A tenancy from year to year could result in this case only if a mutual agreement of parties to that effect could be inferred. How is this possible when the defendant never intended to hold as a tenant from year to year but under the invalid permanent lease? His payment of rent under the permanent lease might no doubt prevent him from setting up, as the result of his adverse possession, any higher right than that of a permanent lessee. It could not create a tenancy from year to year which must be the result of a contract, express or implied. In the absence of a contract, the only question is, what was the right set up by the defendant? This was the view acted on in the cases already cited.

It was next contended that although the previous trustee had no right to grant a permanent lease he was competent to grant a lease from year to year and that the lease must be regarded as a good lease from year to year. But to accept this argument would be entirely to change the contract between the parties which the Court has no power to do. It has no doubt been sometimes held that where a person has a limited power under an instrument and he acts in excess of his power, if the Court can separate the valid portion of his act from the invalid portion, his act could be upheld in so far as it is valid. In *Bishop of Bangor* v. *Parry*,[2] Charles J. refused to accept an argument similar to that urged for the respondent. There a trustee of a charity who had no power without the approval of the Charity Commissioners to grant a lease for more that 21 years executed a lease for 45 years; it was contended that the lease should be upheld as valid for 21 years. The learned Judge held that this could not be done and that the lease must be regarded as altogether invalid and he observed that there was no analogy between the case before him and the class of cases where persons possessing only a limited interest have purported to make a grant in excess of that interest and where it has been held that the grants though bad as

1. (1859) 4 De. G. and J. 136.

2. 2 Q. B. p. 277.

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regards the excess should be regarded as good for so much as was within the competence of the grantors. As illustration of such cases we may mention a grant of a lease by a widow or other life owner for a period longer than her or his life. We do not think that the analogy of such cases is applicable to the lease in question in the present case. We must hold that the defendant acquired by prescription the right of a permanent lessee in the land in question.

We reverse the decree of the Lower Appellate Court and restore that of the District Munsif with costs both here and in the Appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Gazzala Veerayya, minor by mother and next friend Narakka } *Plaintiff* (Appellant.)

v.

Gazzala Ganamma and another. *Defendants* (Respondents.)

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Limitation Act, Art. 125—Hindu Law—Reversioner's suit to set aside alienation by Hindu widow—Cause of action.

The cause of action for a reversioner to sue to set aside an alienation by a Hindu widow during her life time is distinct from the cause of action for another reversioner to bring a like suit and the fact that one is barred by the law of limitation from bringing a suit cannot be a bar to another reversioner against whom minority had the effect of extending the time for bringing like a suit. *Govinda Pillay* v. *Thayammal*,[1] *Bhagwanta* v. *Sukhi*,[2] *Abinash Chunder Mojumdar* v. *Hari Nath Saha*[3] followed, *Krishna Aiyar* v. *Lakshmammal*[4] distinguished, *Mallapudi Ratnam* v. *Mallapudi Raviah*[5] doubted.

Second Appeal from the decree of the District Court of Cudappah in A. S. No. 77 of 1909 presented against the decree of the Court of the District Munsif of Cudappah in O. S. No. 44 of 1909.

S. Swaminadhan for appellant.

V C. Seshachariar for respondents.

The Court delivered the following

Judgment :—The plaintiff in this suit sued as a Hindu reversioner to declare an alienation made by the 1st defendant invalid as against his reversionary interest. The 1st defendant is the

S. A. No. 422 of 1911. 26th July 1912.

1. (1904) I. L. R. 28 M. 57.
2. (1899) I. L. R. 22 A. 33.
3. (1904) 9 C. W. N. 25.
4. (1908) 18 M. L. J. 275.
5. (1902) I. L. R. 25 M. 731.

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daughter of the plaintiff's senior paternal uncle. The plaintiff's case was that the property alienated was given to her for maintenance. This was denied on the part of the defendants. The District Munsif found that it was not proved to have been given for maintenance but he however, took the estate held by the 1st defendant to be a limited one. He also held that the suit was not barred by limitation and gave the plaintiff the declaration asked for. On appeal the District Judge begins his judgment by saying that the only point argued is one of limitation. In considering that point the Judge goes on to say that the Munsif having found that the grant was not for maintenance it must be presumed that it was an absolute gift to 1st defendant with full powers of alienation. If the 1st defendant had an absolute estate with right of alienation then the plaintiff would have no cause of action at all and there would be no question whether his suit for a declaration was barred. He then refers to *Bajrangi Singh* v. *Manokarnika Baksh Singh.*[1] The bearing of that case we suppose was taken to be that the plaintiff would not be entitled to impeach an alienation which his father who was living for some time after it was made did not attack. This again has nothing to do with the question of limitation. Substantially therefore the District Judge has decided the case on the ground that the plaintiff has no cause of action. We cannot regard this judgment as satisfactory and having regard to the statement that the question of limitation alone was argued we cannot accept the finding of the Judge that the 1st defendant had an absolute estate. We must confine ourselves to the consideration of the question of limitation arising from the facts that the plaintiff's father did not sue to set aside the alienation in dispute and that more than 12 years had elapsed from the date of alienation before this suit was brought.

The alienation in question was made in 1896. The plaintiff was then a minor of tender years. His father was alive. The father died without questioning the alienataion. The suit was instituted in 1909 more than 12 years after the date of alienation. It is contended for the respondent that under Art. 125 of the Limitation Act this suit must be held to be barred. That article applies to a suit during the life of a Hindu female by a Hindu, who, if the female died at the date of instituting the suit would be entitled to the possession of land to have such alienation of the land made by the female declared to be void except for her life; the period is 12 years and the starting point is the date of alienation. Now the plaintiff in this suit is a person who would be entitled at the date of the institution of the suit to the possession of the land if the 1st

1. (1907) I. L. R. 30 A. 1.(P. C.)

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defendant then died. The plaintiff was a minor at the date of the suit. We may note that a question was raised with respect to the plaintiff's real age by the defendant but the same issue framed to try it was not pressed and we must therefore proceed on the footing that the plaintiff was a minor. Applying Sec. 6 of the Limitation Act the plaintiff's suit is not barred by limitation as he is entitled to institute it within three years afterh e attained majority; *prima facie* then his suit is not barred. But it is argued by the learned Vakil for the respondent that as at the time of alienation the plaintiff's father was alive and as the father could have instituted a suit for declaration the present suit must be taken to be barred because the cause of action for a declaratory suit is the same for both the father and son, and the son should be taken to claim through the father. The argument was considered and held to be untenable in *Govinda Pillay* v. *Thayammal*[1] by Benson and Davies JJ. The decision in that case is in accordance with the view taken by the Allahabad High Court in *Bhagwanta* v *Sukhi*,[2] and by the Calcutta High Court in *Abinash Chunder Mojumdar* v. *Harinath Saha*.[3] A different view was no doubt taken by the Bombay High Court in *Chhaganram Astikram* v. *Bai Motigavri*.[4] The judgment in that case proceeds on the ground that a remoter reversioner must be taken to claim through the immediate reversioners. As pointed out in *Sakyahani Ingle Rao Saheb* v. *Bhavani Bhoji Saheb*,[5] this view is not in accordance with the dicta of the Privy Council in several cases. These dicta were again considered in *Chivuvolu Punnamma* v. *Chivuvolu Peraraju*[6] a Full Bench decision. The case itself was one for declaration with regard to an adoption. A distinction was made between a suit for a declaration of the invalidity of the alienation made by a widow and of the falsity of an alleged adoption or the invalidity of an alleged adoption made by a widow. In *Chinna Veerayya* v *Lakshmi Narasamma*[7] the view laid down in *Sakyahani Ingle Rao Saheb* v. *Bavani Bhoji Saheb*[5] was followed. Mr. Seshachariar has called our attention to two decisions of this Court which he says support his contention. The first of these is *Krishna Aiyar* v. *Lakshmammal*.[8] There several daughters' sons of a Hindu proprietor instituted a suit for a declaration that certain alienations made by their grandmother were invalid. Some of the plaintiffs had attained their majority more than six years before the suit was instituted. But one of them

1. (1904) I. L. R. 28 M. 57.
2. (1899) I. L. R. 22 A. 33.
3. (1904) 9 C. W. N. 25.
4. (1890) I. L. R. 14 B. 512.
5. (1904) I. L. R. 27 M. 588.
6. (1906) I. L. R. 29 M. 390.
7. (1912) 22 M. L. J. 375.
8. (1908) 18 M. L. J. 275.

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was a minor within 3 years before the institution of the suit. It was contended that the suit was not barred by limitation so far as the latter was concerned. The argument did not prevail. The *ratio decidendi* may be stated in the words of the learned Judges who decided the case. "The plaintiffs are admittedly members of a joint Hindu family and they would be entitled to succeed jointly to the estate of their maternal grandfather Anantakrishna Iyer, if their mother Lakshmi were now dead. *Venkayyamma Garu* v. *Venkatramanayamma Bahadur Garu.*[1] They would inherit his estates as ancestral property under the ordinary law of inheritance with right of survivorship. The first plaintiff was alive at the date of the alienations and the right to sue accrued to the family on the date of the alienation. *Chiruvolu Punnamma* v. *Chiruvolu Peraraju.*[2] The first plaintiff attained majority many years ago and could have brought the present suit on behalf of the joint family." It is clear that the decision proceeded on the ground that the plaintiffs were all entitled to their natural grandfather's property as their joint estate and that the suit could have been instituted by the eldest of them on behalf of all, and the decision in *Venkayyamma Garu* v. *Venkataramanayamma Garu,*[1] is relied on as justifying this view. But as already stated this is not the view held by the Privy Council with respect to the right of reversioners to impeach an alienation made by a widow. The special considerations held to be applicable while the reversioners are the daughters' sons inheriting the estate of their natural grandfather cannot be held to apply to other reversioners. The other case on which Mr. Seshachariar relied is *Mallapudi Ratnam* v. *Mallapudi Ramiah.*[3] There the alienation was made by the maternal grandmother of the plaintiff in 1874. A previous suit has been instituted for declaring the invalidity of the alienation by two of the daughters of grandfather but had been withdrawn. The plaintiffs asked that the original alienation of 1874 as well as what was regarded as tantamount to an alienation by the plaintiffs in the previous suit in consequence of their withdrawing it be set aside. It was held that the withdrawal gave a fresh cause of action to the plaintiffs and the suit was held to be not barred. The learned Judges, however, observe: "The Judge is right in holding that in so far as the alienation of 1874 is concerned this suit is barred by limitation." No reasons are given in support of the opinion and notwithstanding the high authority of the learned Judges who decided it we are with all deference constrained to differ from their view. We must hold that

1. (1902) I. L. R. 25 M. 678. 2. (1906) I. L. R. 29 M. 408.
3. (1902) I. L. R. 25 M. 731.

the suit is not barred by limitation assuming that the 1st defendant had only a limited estate in the property alienated.

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We reverse the decrees of the District Judge and remand the appeal for disposal on the other questions raised in the case including the question of the extent of 1st defendant's estate.

Costs in the Second Appeal will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar.

Solamalai Mudaliar ... ... (*Plaintiff*) Petitioner.

v.

Vadamalai Muthiran ... ... (*Defendant*) Respondent.

Stamp Act S. 36—Cancellation of Stamp—"Has been admitted in evidence"—Meaning of.

It is not possible to lay down any general rule as to what mode of cancellation would be effective as a cancellation of stamp.

Solamalai Mudaliar v. Vadamalai Muthiran.

S. 36 of the Stamp Act lays down a rule preventing only the exclusion of what already is evidence in the proceedings. But if certain proceedings terminated and other proceedings where the documents would not be regarded as being in evidence already, recommence *e.g.*, where the prior *ex-parte* proceedings were set aside, and new proceedings begin, S. 36 would have no application. After the *ex-parte* proceedings are once set aside subsequent proceedings are in substance different, though the suit is technically the same.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Srirangam in Small Cause Suit No. 176 of 1910, dated the 30th day of August 1910.

T. R. Venkatrama Sastri for petitioner.

K. V. Krishnaswami Aiyar for respondent.

T. R. Venkatarama Sastri:—The document was executed outside British India in the Malay States. Sec. 3, Stamp Act requires no stamp for a document such as the one in suit. Cf. S. 19. Therefore it is not an instrument chargeable with duty under S. 35 of the Stamp Act *Mohomed Rowther* v. *Mohomed Husain Rowther.*[1] *Ibrahim* v. *Abdul Rahman.*[2] Secondly the document has been effectively cancelled. There is no provision in the act itself stating the principle. Nor is there any decision discussing it. As a matter of fact stamps are often times in practice cancelled merely by the drawing of a line across them. Thirdly the document was admitted in

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C. R. P. No. 893 of 1910. 10th April 1912.

1. (1899) I. L. R. 22 M. 337.
2. (1898) 8 M. L. J. 182.

Solamalai Mudaliar v. Vadamalai Muthiran.

evidence before the *ex-parte* decree was set aside. Having been once admitted, it admittedly cannot now be objected to. The language of S. 36 is clear on the matter.

K. V. Krishnaswami Aiyar:—The pro-note has been endorsed by the payee in British India in favour of plaintiff. The document is therefore chargeable with duty. See Sec. 3, Cl. 2 and Sec. 19: (2) the document has not been effectively cancelled. See. A. *Ralli* v. *Uramalli Ayal,*[1] *Virabadrapa* v. *Bhimaji.*[2] Moreover that is a question of fact and ought to prevail. The section speaks of this admissibility being objected to in the same proceeding. This is not the same proceeding. The original proceeding terminated when the *ex-parte* decree was set aside. What followed was a new proceeding though technically the same suit. The document has again to be tendered, proved and exhibited. The section shows that the document must be in evidence when its admissibility is being objected to. Moreover in *Chunilal* v. *Mulabai* [3] it was decided that "admitted in evidence." in S. 36 refers to the admission after a judicial consideration of the question as to stamp. It is not so here. I also rely on the report of the Select Committee as showing the spirit of the section. S. 19 speaks of the first holder endorsing. Here it was the payee.

The Court delivered the following

Judgment:—The question raised in this revision petition is whether the Lower Court was right in rejecting as inadmissible the promissory note on which the suit was instituted. The note was executed outside British India but was endorsed over to the plaintiff in British India. It is quite clear under S. 3, Clause *(b)* of the Stamp Act that the document required to be duly stamped. The District Munsiff held it to be not duly stamped because the stamp was not cancelled in such a manner that it could not be used again. The manner in which the stamp was cancelled in this case is stated by the Munsiff thus: "Some blue pencil lines are drawn over to the stamp." The Munsiff considered this not to be an effictive method of cancellation. I have looked at the stamp myself and I am unable to say that the District Munsiff was wrong in holding that the stamp was not properly cancelled. It is not possible to lay down any general rule as to what mode of cancellation could be effective. The legislature has abstained from doing so and perhaps it is as well that Judges should do the same. I have, however, no

1. (1890) I. L. R. 19 Bom. 102. 2. (1902) I. L. L. 28 Bom. 432.
3. (1910) 12 Bom. L. R. 466.

Solamalai Mudaliar v. Vadamalai Muthiran.

difficulty in holding in the present case that the stamp has not been effectively cancelled.

The next question is whether under the provisions of S. 36 of the Stamp Act the document should be regarded as having been admitted in evidence in consequence of which its admissibility could not be called in question again. The suit was at first tried *ex-parte* but the *ex-parte* judgment was subsequently set aside. It was at the *ex-parte* trial that the note was admitted in evidence. The question is whether the language of S. 36 "where an instrument has been *admitted* in evidence" is applicable to such a case. When the promissory note was put in at the second trial the document did not remain as evidence. The whole *ex-parte* proceedings had been set aside and the trial of the suit had to commence *de-novo*. I am of opinion that Sec. 36 applies only to a case where what is in evidence is sought to be expunged by a party who objects that the evidence was wrongly admitted. But here the promissory note had to be tendered in evidence again at the second trial as the previous proceedings proved abortive in law when they were set aside. Suppose a document not duly stamped was admitted in evidence against one person who was then the sole defendant in the suit, but other persons are subsequently made parties and the trial of the suit is *de novo* against them, could it be held that those who were not parties when the document was originally received in evidence could not object to its admissibility? I think not. As I have already stated Sec. 36 really lays down a rule preventing only the exclusion of what already is evidence in the proceedings. But if certain proceedings terminated and other proceedings recommence where the document would not be regarded as being in evidence already, I think the section has no application. Technically, no doubt, the suit is regarded as the same though the *ex-parte* decree might be set aside. But in substance the proceedings are different when they recommence at the setting aside of *ex-parte* decree. I am of opinion therefore that this argument must also fail.

In the result I dismiss the petition with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(Appeal from the Chief Court of Lower Burma.)

Present:—Lord Macnaghten, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

The Rangoon Botataung Company, Limited ... *Appellant.*

v.

The Collector, Rangoon ... ... *Respondent.*

Land Acquisition Case—Award of High Court—Appeal to the Privy Council not maintainable—Right to appeal a statutory right.

Botataung Company Limited *v.* The Collector Rangoon.

A right of appeal must be given by express enactment.

There is no appeal to the King-in-Council from the decision of the High Court in a Land Acquisition case.

This was an appeal from an award of the Chief Court of Lower Burma.

Mr. Bailhache, K. C., Mr. Sankey, K. C. and *Mr. Jolly* for appellants

Mr. Buckmaster, K. C. and *Mr. Sargent* for respondent.

Their Lordships' judgment was delivered by

Lord Macnaghten:—In this case a preliminary objection was taken to the appeal. Having heard the point fully argued, their Lordships came to the conclusion that the appeal was incompetent and they intimated that on that ground they would humbly advise His Majesty that the appeal should be dismissed with costs.

The appeal purported to be an appeal as of right from an award of the Chief Court of Lower Burma. Some land belonging to the Appellants had been taken for public purposes under the provisions of the Land Acquisition Act, 1894. In due course the Collector made his award. The appellants did not accept it. They were dissatisfied with the amount of the Collector's valuation. On that ground and on that ground only they demanded, as they were entitled to do, that the matter should be referred to the Court under the provisions of the Act. The expression "the Court" in the Act is defined as meaning "a principal Civil Court of Original Jurisdiction." The reference was taken by two Judges of the Chief Court. They sat as "the Court" and also as the High Court to which an appeal is given by the Act from the award of "the Court." The hearing of the reference occupied 45 days. More than 100 witnesses were examined. A vast mass of documents was put in and the

16th July 1912.

learned Judges at the request of the parties viewed the premises. Then they made an exhaustive award dealing minutely with the evidence, and they held that the award of the Collector had given the appellants "all and probably more than the full market value of their property," and so they dismissed the reference with costs. They were precluded by the Act from awarding less than the amount awarded by the Collector.

Botataung Company Limited v. The Collector Rangoon.

It was admitted by the learned Counsel for the appellants that it was incumbent upon him to show that there was a statutory right of appeal. As Lord Bramwell, then Bramwell, J., observed in the case of the *Sandback Charity Trustees* v. *The North Staffordshire Railway Company*.[1] "An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment." A special and limited appeal is given by the Land Acquisition Act from the award of "the Court" to the High Court. No further right of appeal is given. Nor can any such right be implied. The learned Counsel for the appellants relied both on Secs. 53 and 54 of the Act. Sec. 53 enacts that, "save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act." That enactment applies to an earlier stage in the proceedings and seems to have nothing to do with an appeal from the High Court. Sec. 54 is in the following terms:—

54. Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under this Act.

That section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its ordinary jurisdiction.

It is impossible to conceive anything more inconvenient than that a Court in this country should be called upon to review the determination of arbitrators as to the value of a piece of land in India—a mere question of fact—without the advantage of any local

1. 3 Q. B. D. 1.

Botataung Company Limited v The Collector Rangoon.

knowledge or the privilege, if it be a privilege, of seeing the cloud of witnesses who engaged the attention of two judges of the Chief Court of Lower Burma for 45 days, or even the opportunity and the interest of viewing a property the value of which seems so extraordinarily difficult to discover.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sadasiva Aiyar.

A. Ramanathan Chettiar ... *Plaintiff (Appellant.)*

v.

Swaminatha Aiyar and others ... *Respondents (Defendants.)*

Ramanathan Chettiar v. Swaminatha Aiyar.

Trust—Trust Act, S. 27—Application to religious trust—Contribution—Usurpation of powers of trustee by Temple Committee—Litigation conducted by Committee Members—Contribution for costs.

The principles embodied in S. 27 of the Trust Act are applicable to all kinds of trusts.

If Committee Members usurp the powers of a temple trustee, the usurpation cannot prevent the trustee from claiming and taking back his powers at any time; and the usurping committee members and the lawful manager are both liable as trustees of the Devastanam for all acts of breach of trust. The usurping Committee Members are trustees *desontort* and as such are liable for the trust monies to the *cestuique trust* for the trust monies in respect of wnich they committed breach of trust.

Where five committee members usurp the function of the trustee of a temple under their supervision and all conducted a litigation in the name of three of them only the costs of which they were directed to pay out of their private funds,

Held, that all the five were liable to contribute though three alone were nominally on the record.

Powers of committee members dwelt on.

Second Appeal from the decree of the Subordinate Judge's Court of Madura (East) in Appeal Suit No. 400 of 1909 presented against the decree of the Court of the Additional District Munsiff of Madura in Original Suit No. 44 of 1908.

K. Srinivasa Aiyangar for appellant.

K. V. Krishnaswami Aiyar for *S. Srinivasa Aiyangar* for respondents.

The Court delivered the following

S. A. No. 1438 of 1908. 2nd April 1912.

Ramanathan Chettiar v. Swaminatha Aiyar.

Judgment:—The plaintiff is the appellant before this Court. He was one of the five Committee Members of the Meenakshi Sundraswarar Saivite Devastanam at Madura, the other four having been defendants 1 to 4. He and two of the other four Committee Members (defendants 3 and 4 in the present suit) filed an appeal to the High Court in a former suit spending monies for the expenses of that appeal out of the Devasthanam funds. The High Court dismissed the appeal in 1898 as unnecessary, (see the case of *Aligirisami Naiker* v. *Sunderaswara Aiyar*[1]) and directed that the costs incurred by the present plaintiff and defendants 3 and 4 in prosecuting that appeal in the High Court "must be paid by themselves out of their private funds as their appeal was uncalled for." In other words it was declared by the High Court that the temple funds ought not to have been drawn upon for the expenses of that appeal and the Committee Members who were responsible for the filing of that appeal should pay such expenses out of their private funds. It followed as a necessary consequence that if they had already drawn upon the temple funds for such expenses they were bound to return to the temple treasury out of their own private funds the amount of such expenses.

The amount which had been spent out of the temple funds on that unnecessary appeal was Rs. 990–10–0. Plaintiff believing that he (as one of the five Committee Members) was liable for only $\frac{1}{5}$ of the amount so improperly spent, paid Rs. 198–2–0 representing his *quota*. The temple trustee then sued all the five Committee Members in O. S. No. 455 of 1900 for the balance of Rs. 792–8–0 and costs of suit. He got a decree against all the five Committee Members in the Court of First Instance, but on appeal by defendants 1 and 2, the plaintiff not having been a party to that appeal they were exonerated by the Appellate Court, because they (defendants 1 and 2) were not formal parties on the record in the High Court Appeal case. Plaintiff was obliged to pay whole of the decree amount in execution of the decree in O. S. No. 455 of 1900.

The plaintiff brought the present suit against the other four members of the committee claiming from each of them, (*a*) $\frac{1}{5}$ share of the Rs. 990–10–0 *i.e.* Rs. 198–2–0 spent improperly on the High Court appeal, (*b*) $\frac{1}{5}$ share of cost (*i.e.*) Rs. 37–11–0 awarded to the temple trustee in the suit O.S. No. 455 of 1900 brought by him (the trustee) against the Committee members and (*c*) interest on these two same at 12 per cent. per annum from this date when the whole money was recovered from plaintiff such interest amounting to

1. (1898) I. L. R. 21 *M.* 278.

Ramanathan Chettiar v. Swaminatha Aiyar.

Rs. 84–13–0 total Rs. 320–10–0, from each of the four sets of defendants.

The Lower Court decreed the plaintiff's claim against some of the defendants in the suit but dismissed his claims wholly against the 1st and 2nd defendants and against their representatives, (respondents 1 to 3 and 10 before us) both 1st and 2nd defendants having died during the course of the litigation. Though the memorandum values the claim in Second Appeal at Rs. 1046–12–1 the learned Vakil for the plaintiff frankly conceded before us that he could legally claim not more than Rs. 198–2–0 as contribution, from each of the two sets of the legal representatives of defendants 1 and 2.

The question, then before us, is whether plaintiff entitled to claim such contribution of $\frac{1}{5}$ share of the costs improperly spent in the High Court Appeal No. 81 of 1897 from each of the defendants 1 and 2. The Lower Court in disallowing the plaintiff's claims against defendants 1 and 2 bases its decision on the following grounds :—

(*a*) Though all the five Committee Members "sanctioned from time to time" the incurring of the entire expenses in connection with the High Court Appeal from Devasthanam fund, only three of them were nominal parties as appellant in the appeal.

(*b*) There is "no authority for the proposition that the Committee Members are trustees of the Devasthanam in the ordinary sense of that term" as no property vests in the committee" (paragraph 10 of the judgment). Hence the law as to contribution between co-trustees is not applicable.

We think that the fact, that the names of the defendants 1 and 2 are not found in the High Court Appeal records as appellants is irrelevant in the consideration of the questions as to their liability to reimburse to the Devasthanam the costs unnecessarily incurred in that appeal and their consequent liability to plaintiff for contribution. The liability for contribution is not based upon any *executable direction* in the judgment of the High Court but upon the question whether all five committee Members were equally guilty of the technical breach of trust which is proved by the judgment of the High Court in the case reported in *Aligirisami Naiker v. Sunderaswara Aiyar*[1] the sufficiency of such proof not being contested by any parties in any of the stages of the litigation in this suit. We have no reasonable doubt, from the overwhelming documentary evidence in the case, (Exhibits B to V)

1. (1898) I. L. R. 21 M. 278.

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that all five were equally to blame in respect of that breach of trust. Section 27 of the Trust Act gives a right of contribution to the refunding trustee against his co-trustees, if all were equally guilty of the breach of trust. Though the Trust Act does not apply to religious trusts (see Sec. 1) the principle of law embodied in Sec. 27 of the Act applies to all kinds of trustees (see Lewin on Trusts, page 1177.)

The second ground on which the Lower Appellate Court refused contribution against defendants 1 and 2 is that the Committee Members were not "trustees." The case in *Panduranga* v. *Nagappa*,[1] *Seshadri Aiyengar* v. *Nataraja Aiyar*,[2] *Subba Naidu* v. *Gopalswami Naidu*,[3] have clearly laid down that neither an individual member of the temple committee nor the committee as a body should take upon himself or itself the duties and the powers of the manager of the temple and that the manager is the trustee in whom the temple property is vested and who alone is entitled to the receipt of its income and represents the temple God (the beneficial owner) fully in litigation and to the outside public. But the records in this case and several other cases which have come before this Court clearly indicate that the temple committees formed for the Madura Devasthanam have been "exercising a degree of minute control over the details of the manager's action in administering the temple which is hardly consistent with the respective responsibilities imposed on the trustee and on the committee by the provisions of Act XX of 1863." (See *Subba Naidu* v. *Gopalswami Naidu*,[3], and have been trying to reduce the managers to the position of mere head ministerial servants of the committee instead of confining the exercise of their powers (as they ought to have done) (a) to laying down the general instruction for the trustees, (b) to calling for periodical accounts (Section 13 of the Act) and for information and explanation where important questions of management are involved; and (c) to giving advice from time to time; and (d) to suspending and even dismissing in cases of gross and continued violation of duties, the committee has been issuing detailed orders to the managers almost daily in regard to the internal management of the institution, the conduct of the litigation and in the appointment and in the dismissal of even the lowest servants of the temple. In short they have almost completely usurped the powers of the trustee directing him to get their sanction even for employing particular legal practitioners in the temple litigation and for paying petty sums in the conduct thereof.

1. (1889) I. L. R. 12 M. 366. 2. (1898) I. L. R. 21 M. 179.
3. (1905) 15. M. L. J. 185.

Ramanathan Chettiar v. Swaminatha Aiyar.

Such an usurpation by the committee cannot, of course, prevent the trustee from claiming and taking back his powers at any time. But whatever may be the rights and liabilities as between the lawful manager and the usurping Committee members they are both liable as trustees to the Devasthanam for all acts of breach of trust. The Committee members in this case became virtually trustees *deson tort* and as such became liable to the *cestui que trust* for the trust monies in respect of which they committed breach of trust (Lewin, pages 231 and 232). It was on that ground that the Committee Members who brought the High Court appeal formerly were directed to bear the costs themselves and not to make it a burden on the temple funds. As between such trustees *defacto* there is no sufficient reason to deny the right of contribution, when they have acted together and have been equally guilty.

In result the Lower Court's decree will be modified by allowing the appellant to recover the sum of Rs. 198—2—0 and interest thereon at 6 per cent from date of suit from respondents 1 to 3 as the legal representatives of 1st defendant and like sum from 10th respondent as legal representative of 2nd defendant. The plaintiff and respondents 1 to 3 and 10 will receive proportionate costs in all courts. The appellant will pay the costs in Second Appeal of the respondents 4 to 9 unnecessarily joined in the appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Bonda Chinnayya and another ... *Appellants.**

v.

Pottula Achammah ... ... *Respondent.*

Small Cause Courts Act (Provincial) Art. 28—Whole or share of the property of an intestate.

Chinnayya v. Achammah.

A claim, for the return of jewels presented on the marriage of plaintiff's daughter and her husband, made after the death of the bride and the bridegroom is not a claim for any property of the intestate within the meaning of Art. 28 of the Provincial Small Causes Act.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in A. S. No. 534 of 1909 presented against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 325 of 1908.

P. Narayana Murti for appellant.

V. Ramesam for respondent.

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*S. A. No. 810 of 1911. 12th August 1912.

Chinnayya *v.* Achammah.

The court delivered the following

Judgment.—A preliminary objection is taken in this case that no second appeal lies against the decision of the Subordinate judge as the suit is of a small cause nature and as the amount sought to be recovered by the plaintiff is less than Rs. 500. The learned Vakil for the appellants contends that the cognizance of this suit by the Small Cause Court is barred by Art. 28 of the second schedule of the Provincial Small Cause Courts Act. The question is whether this is a suit for the whole or for a share of the property of an intestate. If the plaintiff seeks to claim the property as heir of any person then apparently Art. 28 would apply. The maintainability of the second appeal therefore depends on the construction to be placed on the plaint. As we read the plaint, the suit is clearly not based on plaintiff's right to inherit but on her rights to the return of jewels presented by her. The claim is rather a curious one. The plaint alleges that the plaintiff made certain presents to her son-in-law on the occasion of the marriage of her daughter and the son-in-law. Both the son-in-law and the daughter died subsequently. The daughter died after her husband. Now the allegation in the plaint is that the plaintiff is entitled after the death of the pair according to the custom of the caste, to those (*i.e.*, presents) presented by the plaintiff's family, and defendants are entitled to those presented by the defendants' family. What was sought to be proved was that after the death of the bride and the bridegroom the plaintiff was entitled to the return of the presents made to the bridegroom. It is not stated in the plaint that the plaintiff was the heir either of the bridegroom or the bride with respect to the property inherited by the latter from her husband. In the case of heirships the property in question is taken from the person whose heir the plaintiff claims to be as his or her property. The claim is, as we understand it, not to inherit as the property of the bridegroom or of the bride but to a return of what was presented; the basis of the action being that the right derived under the gift made on the occasion of the marriage determined on the death of the bridegroom and the bride and the property returned to where it was before or rather to the parents of the bride. It is a case of the determination of the right granted and the revival of the original right of ownership and, not a case of inheritance from the person to whom the presents were given. Article 28 is therefore not applicable and as no other article bars the cognizance of the suit by the Small Cause Court it must be held to be of a small cause nature and the second appeal must be held to be incompetent. On this ground we dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir R. S. Benson, Officiating Chief Justice and Mr. Justice Napier.

Ponnambala Chetti ... ... *Appellant**.

v.

Muthusami Pillai and others ... ... *Respondents*.

Ponnambala Chetti v. Muthusami Pillai.

Mortgage suit—Suit by non-impleaded puisne mortgagee for redemption—Amount payable by puisne mortgagee for redemption.

When a puisne mortgagee seeks to redeem the prior mortgage by reason of the fact that the prior mortgagee had obtained a decree for sale without impleading the puisne mortgagee in his suit on the prior mortgage the puisne mortgagee is bound to pay the prior mortgagee interest at the mortgage rate and not at the decree-rate.

The puisne mortgagee cannot treat the prior mortgagee as a mortgagee for one purpose and a decree-holder for another purpose. *Umesh Chander Sircar* v. *Zahur Fatima*,[1] *Thenappa Chettiar* v. *Marimuthu Nadan*[2] followed. *Mahomed Ibrahim Hussain Khan* v. *Ambika Pershad Singh*[3] declared not to have changed the law laid down in *Umesh Chander Sircar* v. *Zahur Fatima*.[1]

Second appeal from the decree of the Court by the District Court of Tanjore in A. S. No. 874 of 1904, preferred against the decree of the Court of the Subordinate Judge at Kumbakonam in O. S. No. 15 of 1903.

P. R. Ganapathi Aiyar for appellant.

T. Rangachariar and *V. Narasimha Aiyangar* for respondents.

The question in this case is whether a puisne mortgagee who was not joined as a party to a suit by the prior mortgagee is bound by the amount arrived at in the previous suit or is he entitled to take the accounts newly.

P. R. Ganapathy Aiyar:—I submit he is bound, in the absence of fraud and collusion. *Mahomed Ibrahim Hussain Khan* v. *Ambika Pershad Singh*,[3] has set at rest all pre-existing doubts on the matter. *Umesh Chander Sircar* v. *Zahur Fatima*,[1] has not decided this point but only the point of subsequent interest. *Thenappa Chettiar* v. *Marimuthu Nadan*,[2] follows the last case as if it decides the point; *Ganga Das Bhattar* v. *Jogendra Nathiketra*,[4] deals with this point fully. This is followed in *Gurudev Singh* v. *Chandrika Singh*,[5] and *Ram Taran Goswami* v. *Rameshwar Nalia*,[6]

T. Rangachari:—The latest Privy Council case does not decide his question. There was no contest or argument as to on what

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* S. A. No. 2068 of 1910. 19th July 1912.

1. (1890) I. L. R. 18 C. 164 (P. C.)
2. (1908) I. L. R. 31 M. 258.
3. (1912) I. L. R. 39 C. 527 (P. C.)
4. (1907) 5 C. L. J. 315.
5. (1907) I. L. R. 36 C. 193, 224.
6. (1907) 6 C. L. J. 719.

basis the amount is to be ascertained, nor does it refer to the conflicting decisions of India on the point. Therefore the latest decision of this Court come to on a review of *Umesh Chunder Sircar* v. *Zahur Fatima*,[1] and other decisions should be followed. The Privy Council has decided that the contract rate of interest should be allowed till date of payment; see, *Sunder Koer* v. *Rai Sharn Krishen*. [2]

The Court delivered the following

Judgment:—The facts of this case so far as they are necessary for the dispcsal of this appeal are as follows:—

The 1st and 2nd defendants mortgaged the suit properties first to the 3rd defendant and then to the assignor of the present plaintiff. The 3rd defendant brought a suit O. S. No. 41 of 1887 against the mortgagors without making the puisne mortgagee a party; in execution of that decree he brought the property to sale and brought it. The plaintiff then brought a suit against the 3rd defendant claiming to redeem.

The 5th and 6th issues in the suit were as to the amount that the plaintiff should pay to the 3rd defendant in redemption. The District Judge on appeal called for findings on those issues as the parties conceded that they were necessary and the Subordinate Judge, on the authority of the case in *Kannappa Chettiar* v. *Marimuthu Nadan*,[3] decided that the account should be taken on the footing that the prior mortgage of the 3rd defendant was still in existence, and calculated the amount due accordingly. Against that basis the plaintiff did not appeal but confined himself to objecting to the rate of interest allowed and the calculation of the profits accrued to the 3rd defendant since his possession under the sale. He renews those objections here in Second Appeal but in addition seeks to take other grounds. The first additional ground is that the Court should have given him a decree for redemption without ascertaining the amount due. We decline to allow him to raise this contention as the 5th and 6th issues were sent down for a finding with his concurrence. The other additional ground is that the decision in *Kannappa Chettiar* v. *Marimuthu Nadan*[3] is wrong and all that he can be called on to pay is the amount found due under the decree obtained by the 3rd defendant in his suit with subsequent interest at the decree rate, and he urges that there is a decision of the Privy Council to that effect since the date when he filed his grounds of appeal in the lower Appellate Court. We have allowed him to raise it. It has now to be seen whether his contention is correct. The decision referred to is reported in *Maho-*

1. (1890) I. L. R. 18 C. 164. 2. (1906) I. L. R. 34 C. 150 (P. C.)
3. (1908) I. L. R. 31 M. 258.

Ponnambala Chetti v. Muthusami Pillai.

med Ibrahim Hussain Khan v. *Ambika Pershad Singh.*[1] The passages relied on are on pages 558 and 559. The Board lay down that the puisne mortgagee is entitled to redeem the prior mortgage on payment of the principal and interest in respect of which the property was sold to him under the decree for sale. The Privy Council do not say that the amount decreed is to be paid. There is no argument on this point, the head note does not treat these words as a decision to this effect and lastly the Privy Council do not purport to be overruling their prior decision on this point reported in *Umesh Chander Sircar* v. *Zahur Fatima*[2]. This case was most carefully considered by this court in the case above referred to (*Kannappa Chettiar* v. *Marimuthu Nadan*[3])and the following passage is extracted from it in the Judgment of this Court. "The plaintiff comes to take away from the prior mortgagee the benefit of her decree. It would be unjust if he could use the decree to cut down her interest while he deprives her of the whole advantage of it * * * if she is still a mortgagee she should be allowed such benefit as the mortgage gives her." On this passage this Court held that there was no room for the contention that the puisne mortgagee ought to be allowed to choose whether to adopt or disregard the account directed by the decree. We are of a like opinion that the question is precluded by the authority of the Privy Council and the principle on which it proceeds is clearly enunciated. The prior mortgagee has lost the right arising out of his decree and purchase in execution sale by reason of his failure to make the puisne mortgagee a party as required by S. 85 of the Transfer of Property Act. He is reverted to his position as a mortgagee and is now liable to lose the property by being redeemed. He is therefore sufficiently penalized and the puisne mortgagee cannot treat him as a mortgagee for one purpose and a decree-holder for another. There is nothing in the later judgment of the Privy Council which is inconsistent with the reasoning of their Lordships in this case, and we are bound by it. That objection therefore fails. As to the two grounds taken in appeal both in the lower Appellate Court and before us we agree with the Lower Appellate Court in its construction of the 3rd defendant's mortgage as to the evidence of the compound interest and we are also of opinion that if the provision is penal it is not in excess of what would constitute reasonable compensation. The result is that this second appeal is dismissed with costs.

Time for redemption is extended to three months from this date.

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1. (1912) I. L. R. 39 C. 527. 2. (1890) I. L. R. 18 C. 164.
3. (1908) I. L. R. 31 M. 258.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis.

Nachiappa Goundan ... *Petitioner in C.R.P. 159 of 1911.**

v.

Ponnusamy Naicker ... *Respondent in all.*

Nachiappa Goundan *v.* Ponnusamy Naicker.

C. P. C. Ss. 47 (2) 50—Objection by legal representative that proper procedure was in execution in court which passed the decree—Jurisdiction of executing court to convert suit against legal representative into execution proceedings.

When objection is taken by a legal representative of a deceased judgment-debtor that the proper method of procedure against him was to proceed by way of execution in the court which passed the decree under S. 50 C.P.C., the Court to which the decree has been transferred for execution cannot cure the defect by treating the suit as a proceeding in execution under Cl. 2 of S. 47.

Petitions under Sec. 115 Act V of 1908 praying the High Court to revise the order of the District Court of Salem in Appeal Suits Nos. 189, 193 and 223 of 1909 respectively, preferred against the orders of the Court of the Principal District Munsif of Salem in E. P. Nos. 299, 300 and 301 of 1909 respectively in O. S. No. 176 of 1902 on the file of the Court of the Additional District Munsif of Salem.

T. M. Krishnaswami Aiyar for appellant.

B. Sitarama Rao for respondent.

The Court delivered the following

Judgment:—The Additional District Munsif's Court at Salem passed an order under Sec. 182 of Act XIV of 1882 (Order XVI rule 4 of Act V of 1908) for payment of batta which is recoverable as in execution under rule 13 of Order XVI of the Code of Civil Procedure.

The petition in execution was transferred to the Principal District Munsiff's Court. Subsequently the party against whom the order had been made died and a suit was filed in the same Court against his legal representative who appeared and objected that the matter was one for execution and that under Sec. 50 of the Code of Civil Procedure he could only be brought in by the Court that passed the order. The District Munsif under S. 47 of the Code of Civil Procedure decided to treat the suit as an execution petition and the legal representative as a party to it and proceeded to make an order against him. I agree with the District Judge that this was wrong as the legal representative had not been brought in under S. 50 C. P. C. and the fact that he appeared and objected to the suit and to the right of the Court to bring him in shows that he never waived his right.

The petitions are dismissed with costs.

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*C. R. P. Nos. 159, 161 and 231 of 1911. 16th August 1912.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Mr Justice Wallis, Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Gopalakrishnamaraju by his mother Bangaraya ... *Plaintiff (Appellant.)**

v.

Venkatanarasa Raju and others ... *Defendants (Respondents)*

Bangaraya *v.* Venkatanarasa Raju.

Hindu Law—Joint family—Alienation—Marriage expenses of a male co-parcener in twice born castes.

Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi; and debts reasonably incurred for the marriage of a twice born Hindu male co-parcener are binding on the joint family properties.

Kameswara Sastri v. *Veeracharlu*[1] approved.

Second appeal from the decree of the Sub-Court at Ellore in A. S. No. 145 of 1908 presented against the decree of the District Munsif of Narasapur in O. S. No. 581 of 1906.

The case came on for hearing in the first instance† before *Abdur Rahim* and *Ayling* JJ. who made the following

Order of Reference to a Full Bench "By this appeal the question has been raised whether the 3rd defendant in the suit and his property are liable for a debt incurred to meet the expenses of the 2nd defendant's marriage. The defendants belong to a Kshatriya family.

In *Govindarajulu Narasimham* v. *Devarabhotta Venkatanarayanayya*[2] it was held that a sale of a land belonging to a joint family of Brahmins to defray the expenses of the marriage of one of its male members cannot be said to have been made for family necessity and is therefore not binding on the other members of the family. This decision has been dissented from in *Sundara Bai* v. *Shiv Narayana*[3] and its correctness has been doubted in the judgment of this Court in S. A. No. 1306 of 1907.[1] In both of these cases matter is fully discussed. There is, however, a suggestion in the last mentioned ruling and in a later judgment in A. No. 95 of 06 that a distinction might perhaps be drawn between the case of Sudras and that of the three twice born castes. But though the judgment of *Chandravarkar* J. in *Sundara Bai* v. *Shiv Narayana*[2] and of *Krishnaswami Aiyar* J. in S. A. No. 1306 of 07[1] show that regarding the question from the point of view of religous ceremonial it may be said that there is a greater necessity for marriage among the Sudras than among the higher castes, the Bombay ruling clearly holds that

S. A. No. 1703 of 1909. *19th August 1912.
† 2nd May 1911.
1. (1910) I. L. R. 34 M. 422.
2. (1902) I. L. R. 27 M. 206.
3. (1908) I. L. R. 32 B. 81.

Bangaraya v. Venkatanarasa Raja.

there is no difference in the law in the two cases and that is also the inclination of opinion as expressed in S. A. No. 1306 of 1907.

The question whether the marriage of a male member of a joint Hindu family belonging to one of the twice born castes is a family necessity and whether a debt incurred for the purpose of such marriage is binding on the other members of the family is one of importance and ought to be settled. We, therefore, refer the above question for the opinion of a Full Bench. Pending the receipt of the opinion of the Full Bench, the second appeal will stand over.

T. Prakasam for appellant.

P. Narayanamurti for respondent.

The arguments and cases quoted on both sides are the same as those to be found in the cases referred to in the referring order.

The court expressed the following

OPINION :—It is sufficient to say that we agree with the Judgment of *Krishnaswami Aiyar* J. in *Kameswara Sastri* v. *Veeracharlu*[1] that marriage is obligatory on Hindus who do not desire to to adopt the life of a perpetual Brahmachari or of a Sanyasi and this being so, that debts reasonably incurred for the marriage of a twice born Hindu male are binding on the joint family properties.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph S. Benson *Officiating* Chief Justice and Mr. Justice Napier.

Chirukala Nagalakshmamma ... *Appellant* (*Plaintiff*).*

v.

Visvanadha Sastri and others ... *Respondents.* (*Defendants.*)

Nagalakshmamma v. Visvanadha Sastri.

Hindu Law—Maintenance—Unchaste wife.

An unchaste Hindu wife is not entitled to maintenance from her husband.

Second appeal from the decree of the District Court of Guntur in A. S. No. 213 of 1909, presented against the decree of the Court of the District Munsif, Tenali, in Original Suit No. 802 of 1907.

Plaintiff is 1st defendant's wife. 2nd defendant is 1st defendant's father and 3rd defendant is the minor step brother of 1st defendant. Defendants 2 and 3 support the plaintiff's claim. Plaintiff is the sister's daughter of the 2nd defendant. Plaintiff prayed for a decree against the 1st defendant directing the 1st defendant to pay to the

1. (1910) I. L. R. 34 M. 422.

*S. A. No. 938 of 1910. 17th July 1912.

Nagalakshmamma v. Visvanadha Sastri.

plaintiff a maintenance of Rs. 100 per year, that the $\frac{1}{3}$ portion belonging to the 1st defendant out of the properties in the village of Vemur do stand as a charge for the said maintenance; the 1st defendant to give the plaintiff a suitable residence and brass vessels to the plaintiff; the first defendant to pay the costs of the suits to the plaintiff.

P. *Nagabhushanam* for appellant.

P. *Narayana Murti* and *E. V. R. Sarma* for respondent.

The Court delivered the following

Judgment:—Various circumstances are set out by the District Judge in para 23 of his judgment. We have considered those circumstances in the light of the decisions of this Court in *Ilata Shavitri* v. *Ilata Narayanan Nambudri*[1] and *Kandasami Pillai* v. *Murugammal*[2] and we are of opinion that these decisions are directly in point. In *Kandasami Pillai* v. *Murugammal*,[2] the learned Judge considers that an unchaste wife must show that she is a reformed character before she can be entitled to maintenance and the Court held in *Ilata Shavitri* v. *Ilata Narayana Nambudri*[1] that a Hindu wife living apart from her husband who has been guilty of adultery cannot recover maintenance unless the adultery is condoned. In this case it is not suggested that the adultery was condoned nor has the wife shown that she is a reformed character. She is therefore not entitled to any maintenance on the authority of these cases.

We dismiss the Second Appeal with costs of 1st defendant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Iyer.

Nanjappa ... ... *Appellant*.*

v

Nanjappa Rao ... ... *Respondent*.

Nanjappa v. Nanjappa Rao.

Arbitration—Award—Essentials—Constitution of—Strangers—Private reference pending a suit—Validity—C. P. C. (XIV of 1882) Ss. 375, 525.

Parties to a pending suit are legally competent to refer the matters in dispute to a private arbitration without the help of the court; and especially so when the reference is even by persons other than the parties to the suit.

S. 525 of the old Code applied to an award made on a private reference by parties pending a suit in court.

An award need not be a reasoned judicial decision and arbitrators need not even give their reasons for their conclusions.

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1. (1893) 1 M. H. C. R. 373. 2. (1895) I. L. R. 19 M. 6.

*C. M. A. No. 228 of 1910 and 10 and 75 of 1911. 1st May 1912.

Nanjappa v. Nanjappa Rao.

Arbitrators can get the help of others' opinions in arriving at their own opinions provided they do not thereby delegate or surrender their own judgments.

A private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement, compromise and adjustment within the meaning of 375, C. P. C. (XIV of 1882).

Quaere :—Whether a mere reference to arbitration can be a valid adjustment under S. 375, C. P. C. so that a decree might be passed under the section.

Appeal from the order of the District Court of Salem in Interlocutory Application No. 71 of 1908 (in O. S. No. 2 of 1908).

K. Srinivasa Aiyangar and *B. Sitarama Rao* for appellant; S. 525, C.P.C. applies to awards in pursuance of submissions pending suit. *Tincowry Dey* v. *Fakir Chand Dey*[1], which the court below cites as an authority for the contrary, see also *Nagendra Chandra Banerji* v. *Harendra Nath Mukherjea* [2] The Madras High Court assumes that S. 525 would apply. *Induri Subbarama Reddy* v. *Kandadi Rajamannar*.[3] The Bombay Court also holds that S. 525 would apply to such cases *Shivlinga Rao* v. *Rango*,[4] to which Beaman, J., was a party. *Rukhan Bai* v. *Adamji*[5] is not against this view. The Allahabad Court goes further and holds that S. 523 applies to references pending suits. The earlier cases taking this view are *Sheo Dutt* v. *Sheo Shanker Singh*,[6] *Thakoor Doss Roy* v. *Hunny Doss Roy*,[7] *Adrivalib Das Kalliandas* v. *Utamchand Manack Chand*[8] whether S. 525 applies or not, S. 375 would apply. On this all the Courts seem to be agreed except the dissenting note of Beaman J in *Rukhan Bai* v. *Adamji Shark* [5] *Sami Bai* v. *Pramji Prakji*,[9] *Induri Subbarama Reddy* v. *Kandadi Rajamannar*,[3] *Projday* v. *Giroharidas*,[10] *Joggessar Banerji* v. *Kulyanee Churn Deo*,[11] *Venkatachella Reddy* v. *Rangia Reddy*. [12] Reference under S. 523 itself may be treated as an adjustment. All opinions to the contrary are opposed to the Privy Council decision in *Sadig Husain* v. *Nasir Begam*,[13] reference to an arbitration is an agreement adjusting differences. A reference is a contract the terms of which are ascertained by a named person; Redman, p. 48. Parol submission is good even after the Arbitration Act in England, see Redman, p. 48. Beaman, J., erroneously thinks otherwise. Most of the difficulties, suggested by Beaman, J., do

1. (1902) I. L. R. 30 C. 218.
2. (1911) 16 C. W. N. 35
3. (1900) I. L. R. 24 M. 326.
4. (1906) 8 B. L. R. 777
5. (1908) I. L. R. 33 B. 69.
6. (1904) I. L. R. 27 A. 58.
7. (1864) W. R. M. C. 21.
8. (1879) I. L. R. 4 B. I.
9. (1895) I. R. 20 B. 304.
10. (1904) I. L. R. 29 B. 76.
11. (1875) 24 W. R. 41.
12. (1911) 21 M. L. J. 990.
13. (1911) I. L. R. 33 A. 745 P. C,

Nanjappa v. Nanjappa Rao.

not exist in fact. There is no reason why an award sought to be used as an adjustment should not be impeached on the grounds available in an application under S. 525. Reference of subject matter and other matters in England amounts to an adjustment and the court cannot give directions other than those expressly reserved in the consent order. In *O'Rowcke* v. *The Commissioner for Railways,*[1] a consent decree was passed embodying the agreement of reference. Coming to the merits, the judge takes the erroneous view that discussing with Mr. Bower invalidates the award. But in *Chinnaporchammal* v. *Ranga Naicker,*[2] this court held in similar circumstances that discussing with a person in the presence of parties as an assessor does not invalidate the award. The arbitrators may adopt the opinion of another, Redman, p. 125 *Emery* v. *Wase,*[3] provided he does not act contrary to his own opinion *Eads* v. *Williams.*[4] He may obtain legal assistance. He may consult experts. He is not bound by rules of evidence. He can act on evidence which is not legal *Suppu* v. *Govindacharya,*[5] the reason why he decided in a particular way can't be convassed by courts *Suppu* v. *Govindacharya.*[5] If he acted on the decision of Government, that would not be bad *Rani Bhagoti* v. *Rani Chendan.*[6] He is bound to take evidence which is tendered, he is not bound to call for evidence. His mistakes of law cannot be corrected by the Court. "The time is long gone by" as their Lordships say in *Ghulam Jilani* v. *Muhammed Ahmed*[7] "since courts sat in appeal on the decision of arbitrators whether on questions of fact or law." In this case in addition, there is waiver of irregularity. If a party is aware of an irregularity and yet continues, it is a waiver. Redman p. 115, 155 *Mills* v. *Bowyer's Society,*[8] *Hamilton* v. *Bankin,*[9] *Chand Shah Banik* v. *Gobind Chander Shaha.*[10] For cases of informal inquiry, see *Sundara Mudali* v. *Ponnusami Mudali,*[11] *Chowdhri* v. *Mussamut Bibi.*[12]

T. Rangachariar and *T. M. Krishnasamy Aiyar* for respondent. Parties cannot withdraw subject matter of suits from Court's cognisance. There are only certain known ways of termination of suit *Jumna Kunwar* v. *Nasit Ali,*[13] *Raja of Venkatagiri* v. *Chinta Reddi.*[14] Subject matter of suit can be referred only in the manner provided by S. 506 *Jumna* v. *Nasit Ali.*[13] There cannot be any dis-

1. (1890) 15 App. C. 371.
2. (1898) 9 M. L. J. 34.
3. (1801) 5 Ves. 816.
4. (1856) 24 L. J. Ch. 531.
5. (1887) I. L. R. 11 M. 85.
6. (1885) I. L. R. 11 C. 386 P. C.
7. (1903) I. L. R. 29 C. 167.
8. (1856) 3 K. & J. 66 69 E.R. 1024.
9. 19 L. J. Ch. 307.
10. (1903) 2 C. L. J. 61.
11. (1903) 13 M. L. J. 275.
12. (1876) 3 I. A. 209.
13. (1902) I. L. R. 24 A 412.
14. (1912) 1 M. W. N. 393.

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tinction in principle between reference under S. 523 and awards under S. 525. *Pratapchunam Dey* v. *Toolsey Das Dey*,[1] *Beni Madhub* v. *Preonath Mundal*.[2] S. 19 of Arbitration Act is *pari materia* with Ss. 523, 526 and does not apply to pending suits, *Perui Suryanarayanan* v. *Ghullapudi*, *Chinna* v. *Narasimham*,[3] *Ramjidas* v. *House*.[4] Nor is it a compromise. This is a case of substituted judgment and not a case of adoption of opinion.' There was no case of waiver set up in the lower court. The award is bad as it is indefinite and also determines the rights of a person who is not a party, Redman p. 167.

The Court delivered the following

Judgment:—These are three connected appeals. The Appeals Nos. 10 and 75 of 1911 have been fully argued before us. The decision in C. M. A. No. 228 of 1910 naturally follows from the conclusions, we have arrived at in the two former Appeals Nos. 10 and 75 of 1911.

The facts are somewhat complicated; but for the purpose of our decision, might be shortly stated thus.

Nanja Rao as plaintiff brought Suit No. 9 of 1907 in the Salem Sub-Court for recovery of the impartible Palayapet of Berikai and its appurtenant moveable and immoveable properties against the rival claimant Puttusawmi, and the Court of Wards who supported Puttusawmi. That suit afterwards became O. S. No. 2 of 1908 on the file of the District Court of Salem. Puttusawmi (the 1st defendant) was himself appointed as Receiver pending the disposal of this Suit No. 2 of 1908. Two sureties deposited Rs. 30,000 in Court as security for Puttusawmi's proper management as Receiver.

During the pendency of the suit, the plaintiff (Nanja Rao) the 1st defendant Puttusawmi and the plaintiff's 4 sons executed a Muchilika Exhhibit I, dated the 10th July 1908, in favour of the then Tahsildar of Hosur and of four members of the Taluq Board Office in order to enable them to settle all kinds of disputes "between the parties with referenee to" the Palayapet and properties which were the subject matter of the Suit No. 2 of 1908 then "pending in the Civil Court." The five arbitrators met in the house of the Deputy Collector (Mr. Bower) and gave their award Exhibit II on the 11th July 1908.

1. (1902) I. L. R. 29 C. 793.
2. (1900) I. L. R. 28 C. 303.
3. (1909) 11 Bom. L. R. 1160.
4. (1907) I. L. R. 35 C. 199.

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On the 1st September 1908 (within two months of the award) the 1st defendant Puttusawmi presented a petition under Section 375 of the Civil Procedure Code in Suit No. 2 of 1908, representing that by reason of the private reference to arbitration in July 1908 and the award thereon. The Suit No. 2 of 1908 had been adjusted or compromised. The 1st defendant prayed the Court to pass a decree in accordance with the adjustment or compromise evidenced by the reference and award (Exhibits I and II) so far as it related to the suit No. 2 of 1908 between the plaintiffs and the 1st defendant. This petition under Section 375 of the Civil Procedure Code was numbered as I. A. No. 71 of 1908.

As another string to his bow and simultaneously with the petition under Section 375, the 1st defendant (Puttusawmi) filed a petition against the plaintiff (Nanja Row) and his four sons under Section 525 of the Civil Procedure Code praying that the award (Exhibit II) might be filed in Court. This application was registered as an Independent Suit No. 23 of 1908 (between the first defendant in Suit No. 2 of 1908 as plaintiffs and the plaintiff in Suit No, 2 of 1908 Nanja Row and his sons as defendants). To avoid confusion, we might continue to style Puttusawmi as 1st defendant and Nanja Row as plaintiff though in Suit No. 23 of 1908 their positions are reversed and though Puttusawmi died after Suit No. 23 of 1908 was filed his legal representatives having been allowed to continue the litigations.

While the petition I. A. No. 71 of 1908 (under Section 375) was pending, sureties of the 1st defendant put in Petitions Nos. 45 and 77 of 1909 in March and April 1909 to be relieved of their obligations and for return of their deposit of Rs. 30,000

The learned District Judge dismissed the 1st defendant's Petition No. 71 of 1908 (filed under Section 375) on the ground that the award did not constitute an "adjustment by legal agreement or compromise." He dismissed the 1st defendant's suit No. 23 of 1908 and refused to file the award Exhibit II on the grounds :—

That the award Exhibit II was not a reasoned judicial decision.

That the five arbitrators allowed the Deputy Collector (Mr. Bower) to be "the real President of the whole (arbitration) proceedings" and the co-operation of (Mr. Bower) without authority "is a material irregularity which nullified the award."

"That the decision of the question of the allowances to be made to Nanja Row (plaintiff) in O. S. No. 2 of 1908 was based on material supplied by Puttusawmi's (1st defendant's) clerk to which the other side was not allowed access."

That the arbitrators having been guilty of these irregularities, they were guilty of "misconduct" though there was "no reason to impute bad faith" to them and hence the award was not legally enforceable, and that the award is further illegal because "when once a dispute has been brought before a Court of justice by suit" (in this case Suit No. 2 of 1908) it cannot be referred to arbitrators except by order of the Court under S. 506; and a private reference in a pending suit is illegal and the award made on such a private reference cannot be filed in Court under S. 525.

The learned District Judge decided on the petitions Nos. 45 and 77 of 1909 filed by the sureties of 1st defendant and that they should forefeit Rs. 15,000 of the Rs. 30,000 deposit because 1st defendant had caused loss to the estate to the extent of about Rs. 14,000 by his management as Receiver.

Civil Miscellaneous Appeal No. 75 of 1911 before us is against the dismissal of I. A. 71 of 1908 filed by 1st defendant (under Section 375) C. M. A. 10 of 1911 is against the order refusing to file the award Exhibit II the order having been made in O. S. 23 of 1908 brought by 1st defendant under S. 525, C. M. A. 228 of 1910 is by the two sureties of 1st defendant against the order making them forefeit Rs. 15,000.

We think (differing from the learned District Judge) that the award Exhibit. II, is a legally valid award. Taking first for consideration the objection to the award marked above as (5) that there is no provision of law which prevents parties from agreeing to refer the disputes pending in a suit between them to private arbitration without making an application to the Court under S. 506, just as there is nothing to prevent them from making any other agreement or adjustment or compromise pending the suit. Especially (as in this case) where the parties to the private reference to arbitration include not only the parties to the suit but include also persons other than the parties to the suit, should such a reference not be prohibited; for, it would be inequitable to prevent third persons from settling their disputed claims by arbitration, simply because the parties in a pending suit are also interested in such claims and have to join in the reference. They (the third parties) cannot join in an application under S. 506, as they are not parties to the suit. An involved argument has been addressed to us by the respondent's (plaintiff's) learned vakil based on some passage in the judgments in *Gulam Khan* v. *Muhamad Hussain*[1], and

1. (1902) I. L. R. 29 C. 167.

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Tincowrie Dey v. *Fakir Chand Dey.*[1] In *Gulam Khan* v. *Muhamad Hussain*,[2] their Lordships of the Privy Council classify the provisions in Ss. 506 to 528 of the old Civil Procedure Code under three heads.

Where the parties to a litigation desire to refer to arbitration any matter in difference between them in the suit, in which case all proceedings are under the supervision of the court.

Where parties *without having recourse to litigation* agree to refer their differences to arbitration and it is desired that the agreement of reference, should have the sanction of the court, in which case all further proceedings are under the supervision of the court and (3) where the agreement of reference is made and the arbitration itself takes place *without the intervention of the court*, and the assistance of the court is only sought in order to give effect to the award.

In class (2) the words " without having recourse to the litigation" are not italicised by their Lordships of the Privy Council but we have italicised them because the learned Chief Justice of the Calcutta High Court seems to have laid stress on these words in coming to the conclusion in *Tincowrie Dey* v. *Fakir Chand Dey*,[1] that " S. 523 (of the old Procedure Code) does not apply to the case of an agreement to refer, when there is a pending litigation."

We do not think that their Lordships of the Privy Council intended by their classification (2) which included some references under S. 523 to lay down that all references, coming under S. 523 could be made only by persons who were not then parties to a pending litigation probably, the phrase without having recourse to litigation" was intended to cover all cases where parties agree to refer their disputes to arbitrators " without the intervention of the court" which latter is the phrase used in the third classification.

The Allahabad High Court in *Sheo Dutt* v. *Sheo Shankar Singh*,[3] held that S. 523 could be applied even in respect of a reference pending suit, but it is unnecessary to express a final opinion on this question as we have to deal at present with a state of facts coming not under classification (2) of the Privy Council but under classification, (3) (that is a state of facts where there has been not only a reference out of court but also an award made out of court and the assistance of the court is sought only in order to give effect to the award). Hence the *obiter dictum* of Maclean C. J. that

1. (1903) I. L. R. 30. C. 218. 2. (1902) I. L. R. 29, C. 167.
3. (1905) I. L. R. 27 A. 53.

S. 523 does not apply to a reference of disputes in a pending litigation is not useful for the decision of this case. On the other hand there is a passage in lines 2 to 4 of the judgment of Maclean, C. J. himself in *Tincowrie Dey* v. *Fakir Chand Dey*,[1] in favour of the view that the assistance of the court could be validly invoked under S. 525 in such a case. In none of the cases quoted to us on the respondent's side has it been decided that S. 525 cannot apply to an award made on a reference pending suit, and we are unable to follow the respondent's vakil's argument that because S. 523 has been considered in some *obiter dicta* as inapplicable to a reference by agreement to arbitration out of court of a pending suit, S. 525 is likewise inapplicable to an award made on such reference. An award is always binding on the parties who made the reference provided the arbitrators were not guilty of misconduct. *Jadunath Choudhry* v. *Kailas Chandra Bhatta Chatterjee*.[2]

Coming to the objections (f) to (f4) to the award, arbitrators are not bound to give "a reasoned judicial decision" and are merely bound to give an intelligible decision which determines the rights of the parties in relation to the subject matter of the reference (Redman on Arbitration IV Ed. p. 163). They are not bound to give reasons at all, and there are cases (which we think it unnecessary to quote) which have held that they should not even be asked for the reasons which have led to their decision (see Redman on Arbitration, p. 140).

Having heard the evidence read and commented on by both sides we do not think that the five arbitrators surrendered their judgments to Mr. Bower in such a manner that, against their own view of the rights of the parties, they adopted Mr. Bower's view and acted merely as his mouthpiece. When he suggested Rs 14,000 as the reasonable sum payable to the plaintiff (Nanja Rao) the arbitrators increased it to Rs. 15,000. Mr. Bower says as court witness No. 1. "I understood that the arbitrators had full discretion and were quite unfettered that the award was to be the work of the arbitrators but that I was to represent to the arbitrators any points that would tell for or against either side." The Tahsildar (D. W. No. 1) (who was the principal arbitrator and who afterwards became a Special Deputy Collector) says that Mr. Bower helped the arbitrators by his opinion in arriving at a decision. The evidence of the Tahsildar and of plaintiff's witnesses Nos. 1 and 2 (two of the arbitrators) clearly shows that they and the other arbitrators made inquiries of, and obtained statements, from the parties and checked account state-

1. (1903) I. L. R. 30 C. 218 at 328. 2. (1909) I. L. R. 37 C. 63.

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ments, discussed with the parties as to income and expenditure of the estates and the debts and expenses of Nanja Row's side (family) another proper amount to be allowed for Nanja Row's maintenance, took into consideration the previous history of the litigation, consulted Mr. Bower and finally came to their own conclusions and made their award. In Redman on Arbitration IV Ed. (pages 124 and 125) it is said that while "arbitrators cannot without the consent of the parties, agree beforehand to be bound by the opinion of a third person *without exercising their own judgment upon the point*", arbitrators are at liberty to consult others and adopt their opinions "as evidence which satisfied their minds upon the point" and that arbitrators "can adopt the opinion of another person" as their own. They cannot delegate or surrender their own judgments and conscience, but if they do not act "contrary to their own judgment" they can get the help of other's opinions in order to arrive at their own opinions.

We hold that the award was the work of the arbitrators and the mere fact that Mr. Bower gave help to the arbitrators to enable them to arrive at their decision does not vitiate the award. As regards the last objection that some "material" was supplied to the arbitrators by Puttusawmi's clerk "to which the other side was not allowed access", we are satisfied from the evidence that the plaintiff and his sons had notice of the "material" so supplied and there is no proof that they were refused access to that material. In *Buta* v. *Municipal Committee of Lahore*[1], the Privy Council held that where the arbitrators innocently applied for and accepted the advice of the defendant's Counsel without notice to or knowledge of the plaintiff in respect of the construction of the agreement to refer, the arbitrators were not guilty of misconduct (see also *Rolland* v. *Cassendy*.[2])

Lastly we might state, that there is clear evidence to show that all objections to any irregularities in the arbitrator's procedure were completely waived by the plaintiff and his sons. Mr. Bower says that all parties were present when the award was read out, that Nanja Row was satisfied with the award and made *Namaskarams* to Mr. Bower and that Nanja Rao and one of his sons thanked Mr. Bower for the part he had taken in the arbitration proceedings (D. W. No. 1). The Tahsildar says that the plaintiff and his elder son expressed satisfaction when the award was read out (in the presence of 100 people according to (P. W. No. 1) and made *Namaskarams* to Mr. Bower. (P. W. No. 2) also says that the parties were quite satisfied with the award when it was read out. Under

1. (1902) I. L. R. 29 C. 854. 2. (1888) I. L. R. 13, A. C. 770 777.

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these circumstances the award could not now be impeached on account of alleged irregularity in the procedure of arbitration (see Redman on Arbitration, page 155), where it is said that not only irregularities but even "improper conduct" on the part of arbitrators might be waived and that all objections as to irregularities known to the parties before the pronouncement of the award must be made before delivery of such award.

As regards the other objections to the award (except one to be mentioned presently) put forward by Nanja Rao and his sons in the lower court and repeated before us, we entirely agree with the learned District Judge that they are unsustainable. One objection, however, to the award, namely, that it determines some matters not referred to arbitration seems to us to be sustainable. Nanja Row's third son, Choka Row seems not to have been a party to the arbitration as supposed by the learned District Judge. The 6th paragraph of the award, so far as it declares that he has no right in the property in dispute in Suit No. 2 of 1908 cannot be supported. But it could be separated without "affecting" the other portions of the award (see Article 14 (*a*) Sch. II, Act V of 1908 and Redman on Arbitration (IV, Ed. 205 and *Kurshed Ali* v. *Wazir-un-nissa*[1]) and does not affect the validity of the remaining portions. The sixth para of the award will, therefore, be made so as to read " that in future neither Nos. 2 to 6 nor their heirs claiming under them in their rights shall have any right and interest, etc."

In the result we set aside the order of the District Judge in C. S. No. 23 of 1908 refusing to file the award, Exhibit. II and we direct that it be filed subject to the amendment above set out and that judgment and decree shall follow in terms of the amended award. The respondents will pay the plaintiff's costs in C. M. A. 10 of 1911 in both Courts.

As regards C. M. A. 75 of 1911 the case in *Pragdas* v. *Girdhardas*,[2] *Brojadurha Singh Ramanath Ghose*,[3] *Lakshmana Chetty* v. *Chinnathambi Chetty*[4] are clear authorities for the proposition that a private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement, compromise and adjustment under S. 375 and effect ought to be given to such an adjusment in the suit so far as the award relates to the suit. There are certain remarks in the nature of *obiter dicta* by Beaman J, in *Rukhmabai* v. *Adamji*[5] tending to throw doubts on the validity of the reason-

1. (1910) 7 A. L. J. 778.
2. (1902) I. L. R. 26 B. 76.
3. (1897) I. L. R. 24 C. 908.
4. (1901) I. L. R. 24 M. 326.
5. (1909) I. L. R. 33 B. 99.

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ing in the above 3 decisions, but we need only remark that we are unable to take the view that the reasoning of the learned Judge has displaced their authority. Whether a mere agreement to refer to arbitration will itself be an adjustment under Section 375 so that a *decree* might be passed under section referring the suit to arbitration as per the agreement (as distinguished from a mere order of reference under Section 506 on application of the party) is a doubtful question though the Privy Council has accepted such a decree as a proper decree and as putting an end to the suit (see *Sadiq Hussain* v. *Farjir Begum*[1] and also the observations of Hill J. in *Tincowrie Dey* v. *Fakir Chand*[2] but it is unnecessary to go into that point in this case where an award has followed the reference.

In the result C. M. A. No. 75 of 1911 will also be allowed with costs (the question of the validity of the award being *res judicata* by our decision in C. M. A. 10 of 1911).

The award Exhibit II and the reference Exhibit I shall be recorded as the agreement effecting a compromise and adjustment of the suit No. 2 of 1908 as between the plaintiff and the 1st defendant's representative so far as the terms of the award apply to the disputes in the suit. The plaintiff must pay the costs of this appeal and of the enquiry into petition No. 71 of 1908 in the lower Court to the first defendant's representatives.

We now come to C. M. A. No. 228 of 1910 under the decisions given as above suits Nos. 2 and 23 of 1908 following the award Exhibit II the plaintiff (Nanja Rao) is adjudged to have no interest in the suit Palayapet and its appurtenant properties.

The 1st defendant's mismanagement of the estate, even if proved could not have prejudiced the plaintiff in suit No. 2 of 1908 in any degree and the sureties who gave security for the management of the estate by the receiver (1st defendant) have a right to be reimbursed by the receiver (1st defendant) who is under the decree in the suit, declared entitled to the Palayapet and its appurtenances (except the two villages mentioned in the award which the plaintiff enjoys and which did not go into the hands of the Receiver). Hence the petitions of the sureties for repayment of the sums deposited as security ought to be allowed wholly. The appeal No. 228 of 1910 is therefore allowed but without costs.

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1. (1909) I. L. R. 33 A. 743. 2. (1903) I. L. R. 30 C. 218.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Kandasami Pillai ... ... *Appellant** (*1st Plaintiff*).

v.

Rangasami Nainar (died) and others... *Respondents* (*Defendants*).

Kandasami Pillai *v.* Rangasami Nainar.

Estoppel—Attestation, effect of—Estoppel as the cause of action—Estoppel as an answer to a plea in bar of plaintiff's claim—Civil Procedure Code S. 317, scope of.

Per Curiam Attestation will in certain circumstances create an estoppel.

Per *Sundara Aiyar* J.—No actual verbal representation is necessary to give raise to estoppel.

Where a purchaser in court auction attests the sale deed relating to the property purchased by him by a third person and it is impossible to doubt that the object of the attestation was to re-assure the purchaser from the third person that the latter had title to the property as against the attestor, *held* that the attestation estopped the court-sale purchaser from asserting his own title to the property; and if, after the said sale by the stranger the certified purchaser obtains a certificate from court in respect of his purchase in court sale, *held*, that it was fraudulent on his part to so obtain a sale certificate after his attestation and that the said fraud fell within S. 317 Civil Procedure Code. (XIV of 1882).

S. 317 Civil Procedure Code (XIV of 1882) is no bar to a plea of estoppel based on facts, subsequent to the court sale.

Per *Sadasiva Aiyar* J.—Attestation by a person who has or claims any interest in the property covered by a deed of transfer is *prima facie* a representation by him that the title and other facts relating to the title recited in the document are true and will not be disputed by him as against the obligee under the deed.

Obiter.—Although S. 317 of Act XIV of 1882 should be construed strictly, the words of the section ought to be given effect to if they apply aptly to the plaint.

S. 317 applies to suits against a purchaser's representatives and assigns.

After the Transfer of Property Act, no waiver or transfer of rights can be recognised in the case of an immoveable property in the absence of a registered instrument. *Mannappa* v. *Surappa*[1] held inapplicable.

Estoppel by itself cannot form the basis of a cause of action, but can be used as a bar to the defendant's plea in answer to the cause of action otherwise alleged and proved.

Second appeal from the Decree of the District Court of Tanjore in A. S. No. 48 of 1908 preferred against the Decree of the Court of the District Munsif of Mayavaram in Original Suit No. 1 of 1908.

T. V. Seshagiri Aiyar for appellant.

T. R. Venkatarama Sastri for respondents.

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*S. A. No. 182 of 1910. 26th July 1912.

1. (1887) I. L. R. 11 M. 234.

Kandasami Pillai v. Rangasami Nainar.

Sundara Aiyar J.

The Court delivered the following

Judgment.—*Sundara Aiyar* J.—The suit in this case is for restraining first defendant from interfering with the plaintiff's enjoyment of certain lands. The plaintiff obtained a sale of it from the 2nd defendant in 1906. Prior to the sale the land had been sold in execution of a decree against the 2nd defendant in a Small Cause Suit. The 1st defendant was the auction purchaser. The auction sale took place in June 1904. Admittedly the land previously belonged to the 2nd defendant. The plaintiff's case is that the auction purchase was really for the benefit of the 2nd defendant and that the 1st defendant was only a benamidar. This plea has been upheld by both the courts. The 1st defendant set up his own title to the land as the real purchaser and contended that S. 317 of Civil Procedure Code was a bar to the plaintiff's suit. Both the Lower Courts held that S. 317 was not applicable in the circumstances of the case. There was an issue raised as to whether the 1st defendant was estopped by his conduct from questioning plaintiff's title. The conduct referred to consisted in the 1st defendant allowing the 2nd defendant to remain in possession of the land for a period of about 3 years after the auction sale without taking any steps to assert his own title and in his attesting the sale deed executed by the 2nd defendant in plaintiff's favour Ex. C. The 1st defendant stated that he made the attestation without any knowledge of the contents of Ex. C. But his story had been disbelieved by both the courts. I am of opinion that this appeal may be disposed of on the issue of estoppel. Ex. C. was executed on the 6th July 1906. Till then the 1st defendant did not take steps to obtain a sale deed though the took place in April 1904 and it was confirmed in June 1904. His application for a certificate was made in 1907 after he has attested Ex. C. Now Ex. C. recited that the land belonged to the 2nd defendant and was in his enjoyment. And this document was found by the lower Courts attested by the 1st defendant with full knowledge of its contents. The District Munsif found more against the 1st defendant. He was of opinion that there were good reasons to believe that it was the 1st defendant who brought about the sale and it cannot therefore be doubted for a moment that his attestation and also that of his undivided son were obtained as security for the vendees in token of the 1st defendant having admitted that he was only a benamidar in respect of the land purchased in court auction and which was with his full knowledge and consent included in the sale deed. The District Munsif does not say that it was the 1st defendant who brought about the sale deed. If he did so there could be no doubt 1st defendant would be estopped from asserting his own

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ownership, subject to an argument of Mr. Seshagiri Aiyar which I shall hereafter notice that the rule of estoppel is not applicable to such a case. There are no reasons to believe that the District Judge did not really agree with the District Munsif in his observation as to the part taken by the 1st defendant in the matter of the execution of the sale deed Ex. C. But it is not necessary to rest my judgment on the assumption that the District Judge intended to agree with the District Munsif. It would be quite enough if the 1st defendant with the knowledge of the recital that the land belonged to the 2nd defendant and was in his enjoyment as owner attested the sale deed executed by him to the plaintiffs. In the leading case of *Sarat Chunder Dey* v. *Gopal Chunder Laha*[1] the Judicial Committee of the Privy Council expounding the law of estoppel observe "The principle on which the law and statute rest is, that it would be most inequitable and unjust to him that if another by a representation made or by conduct amounting to a representation has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement to the loss and injury of the person who acted on it." It is quite clear both from the exposition and from the words of Section 115 of the Indian Evidence Act themselves that no actual verbal representation is necessary to give rise to estoppel. It is quite enough that the conduct of a party leads another to act in the belief that he asserts no claim to the property. A passage from the judgment of Lord Campbell in the case of *Cairncross* v. *Lorimer*[2] is cited by the Privy Council in the judgment "I am of opinion that generally speaking if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to his sincerity he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." Their Lordships go on to say " these words were used with reference mainly to acts indicating only subsequent consent to an application which had been made and which might have been objected to when originally made; but they apply a *fortiori* in a case like the present where the person estopped was a party to the transaction itself which he or others taking title from him seek to challenge after a considerable interval of time. In *Carr* v. *The London and North-Western Railway Company*[3], a very leading decision on the question of estoppel, the following was one of the propositions laid down.

1. (1892) I. L. R. 20 C. 296, 311. 2. (1860) 3. Macq. 827, 829, 8:9.
3. (1875) L. R. 10 C. P. 307 at 317.

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" Another proposition is, that, if a man whatever his real meaning may be so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented." Here at the time of the execution of Exhibit C, the 1st defendant was the ostensible purchaser at court auction. The sale deed was executed by the 2nd defendant. Not only the 1st defendant but his son also attested the document. It is impossible to doubt that the object of the attestation was to reassure the plaintiff in taking a sale deed from the 2nd defendant when the ostensible purchaser at the auction sale was the 1st defendant. We have no hesitation in saying that the 1st defendant must be held to be estopped from asserting his own title to the land.

It was argued by Mr. Seshagiri Aiyar that S. 317 embodies a rule of public policy and that there can be no estoppel contravening that rule. In my opinion there is no contravention at all of the rule in S. 317 in holding that the 1st defendant is estopped. S. 317 lays down the rule that where property is brought to sale in court auction a suit cannot be instituted on the ground that the defendant was only a benamidar for the plaintiffs. The utmost that could be said in favour of the 1st defendant is that the effect of the section is to create some sort of title in him though this position is denied by the respondent. But assuming it to be so, what is there to prevent a person who gets title, we shall suppose under a statute, from afterwards allowing it to be sold as the property of another person? I can find no reason why he should not do so any more than why a person having a title under a private conveyance should not allow it to be sold as the property of another. The cases cited by Mr. Seshagiri Aiyar viz., *Abdul Aziz* v. *Khantker Mullick*,[1] *Kristnan Chetty* v. *Vellaichami Thevan*,[2] and *Madras Hindu Benefit Permanent Fund* v. *Ragava Chetty*,[3] are all inapplicable to the case. The attempt there was to get behind the very rule itself enacted by the statute by getting up a contention of estoppel. I might also put this judgment on another ground. S. 317 provides " nothing in this section shall bar a suit to obtain a declaration that the name of any person certified as aforesaid was inserted in the certificate fraudulently." After the 1st defendant attested

1. (1911) I. L R. 38 C. 512. 2. (1911) 21 M. L. J. 1077.
3. (1895) I. L. R. 19 M. 200.

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Ex. C. which distinctly stated that the land belonged to the 2nd defendant it was fraudulent on his part to have obtained in 1907 a sale certificate in his own name.

On these grounds the second appeal must be dismissed with costs.

Sadasiva Aiyar.—As many of the questions argued in the second appeal are important questions, I do not think it inappropriate to add a few words of my own. If the plaintiffs are obliged to set up a part of their case for relief, the allegation that the 1st defendant made the purchase benami and cannot succeed except by proving the fact I am inclined to hold that S. 317 will be a bar to the suit. I agree with the observation in *Bishan Dial* v. *Gazziuddin,*[1] that although S. 317 should be construed strictly the words of the section ought to be given effect to if they apply aptly to the plaint put forward by the plaintiff, and I am also not inclined to try to whittle away the effect of the section as has been done in some cases by excluding from its operation cases where the suit is brought against the purchaser's representatives and assigns. I also agree with Mr. Seshagiri Aiyar that after the Transfer of Property Act no waiver or transfer of rights can be recognised in the case of immoveable property of a registered instrument. Hence the observations in *Mannappa* v. *Surappa*[2] may not apply to cases of alleged transfer by the subsequent conduct of the benamidar or by an oral agreement with the benamidar if such conduct or agreement took place after Act 4 of 1882 came into force. It is also clear as decided in *Krishnan Chetty* v. *Vellaichami Thevan*[3] that estoppel by itself cannot form the basis of a cause of action or claim. But in this case the plaintiffs are in possession is *prima facie* evidence of title. The 2nd defendant had conveyed all his right to 2nd plaintiff and 1st plaintiff's vendor and could not therefore deny plaintiff's title, and if so the defendant as contended in paragraph 6 of the plaint is estopped by his conduct from asserting any title as against the plaintiffs. The plaintiffs need not rely at all upon and need not prove the allegation that their title is based upon 1st defendant having purchased in the court auction sale as the benamidar of the 2nd defendant. They need only prevent 2nd defendant from claiming any title under the court auction purchase and they could do by setting up the doctrine of estoppel.

As regards the question of estoppel also, though the District Judge does not in so many words say that the 1st defendant himself

1. (1901) I. L. R. 23 A. 175. 2. (1887) I. L. R. 11 M. 234.
3. (1911) 21 M. L. J. 1077.

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brought about the sale made by the 2nd defendant to the 2nd plaintiff and 1st plaintiff's vendor, he says "it is impossible to concur generally in the lower Court's conclusions of the District Munsif in which the District Judge evidently so concurs seems to me that the 1st defendant did bring about the sale and did not merely attest the document Ex. C.

I am also of opinion that having regard to the ordinary course of conduct of Indians in this Presidency, attestation by a person who has or claims any interest in the property covered by the document must be treated *prima facie* as a representation by him that the title and other facts relating to title recited in the document are true and will not be disputed by him as against the obligee under the document. I therefore concur in the conclusion that the second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Ganapathy Aiyar ... ... *Plaintiff (Appellant).**

v.

Sivamalai and others... ... *(Respondent) 2nd defendant's legal representatives and 1st defendant.*

Executor, powers of before obtaining probate—Bona fide purchaser's rights.

Ganapathy Aiyar v. Sivamalai.

An executor has power to sell the estate for the purposes of administration without obtaining probate, and the purchaser in the absence of any allegation that he is a *mala fide* purchaser having knowledge that the sale was not made in due course of administration, gets a good title.

Second Appeal from the decree of the District Court of Coimbatore in A. S. No. 106 of 1910 preferred against the decree of the Court of the District Munsif of Erode in O. S. No. 480 of 1908.

T. M. Krishnaswami Aiyar for appellant.

L. A. Govindaraghava Aiyar for respondents.

T. M. Krishnasami Aiyar :—The alienation in question here is by an executor. Therefore, Art. 44 has no application. Probate and Administrative Act S. 4 vests the estate only in executors that take out probate. See the dictum of the Privy Council in *Administrator-General* v. *Premlal Mullick*,[1] and the decision of the

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*S. A. No. 523 of 1911. 1st August 1912.

1. (1895) I. L. R. 22 C. 788 at 797.

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Calcutta High Court in *Sarat Chandra Banerjee* v. *Bhupendra Nath Basu*[1]; the section appears in the chapter as to grant of probates. The preamble of the act similarly says that the Act was passed for providing for the grant of probates.

L. A. Govindaraghava Aiyar:—Sec. 4 is perfectly general. Sec. 187 does not apply to executors of Hindu wills outside Madras. *Shaik Moosa* v. *Shaik Essa*,[2] is in point and it has been followed in subsequent cases. Under S. 90, executor has power to sell or mortgage. In the absence of any allegation of fraud or knowledge that the debts had to the knowledge of the purchaser been already paid, there is no ground for setting aside the sale.

The Court delivered the following

Judgment:—The plaintiff as legatee under a will sues to recover certain properties which were sold by the 1st defendant his natural father and executor under the will, to the 2nd defendant in 1897. The suit was instituted in 1908. The plaint alleged that the sale was not binding on the plaintiff. The second defendant contended that the 1st defendant had authority to sell and that the sale was made for discharging certain debts due by the deceased testatrix. The District Munsif held that the sale was not binding on the plaintiff and gave a decree in his favour. On appeal the District Judge disposed of the case on the question of limitation. He held the suit barred as it was instituted by the plaintiff more than 3 years after the date of his attaining majority; he regarded the suit as one to set aside an alienation made by a guardian and applied Art. 44 of the Limitation Act. The 2nd defendant has not contended that the sale was made by the 1st defendant in his capacity as guardian. We are of opinion that the finding on the question of limitation cannot be upheld. The 1st defendant was executor and he had the powers of an executor. His right to deal with the estate must be regulated by rules relating to the powers and duties of an executor subject to any express provisions that may be contained in the will. There are in the will in this case no provisions either restricting or extending the scope of the executor's powers. The act cannot be regarded as having been done by the executors as a guardian when his powers were regulated by the rules relating to an executor.

Article 44 of the Limitation Act must therefore be held to be inapplicable. Mr. Govindaraghava Aiyar contends that Art. 91 must govern the case. We cannot agree with him. We do not think that

1. (1897) I. L. R 25 C. 103. 2. (1884) I. L. R. 8 B. 241.

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the plaintiff could not succeed in recovering the property without setting aside the alienation. The alienation was not one made by him or by any one from whom he claims the property as heir. The executor's alienation would be binding on the plaintiff if it was valid; if it was not it would have no effect as against him. It cannot be held to be a transaction binding on him until he set it aside, although no doubt he could ratify the act done by the executor. No authority has been cited in support of the application of Art. 91 in such a case. We hold it is not applicable.

The District Judge has not recorded any finding on the merits of the case, that is on the question whether the alienation is binding on the plaintiff. We propose to decide the question ourselves instead of remanding the case for decision by the Appellate Court. The plaint does not contain any allegation that the 2nd defendant was aware that the sale was not a proper act of administration and was not required for the purpose of discharging debts of the deceased. Undoubtedly, the plaintiff was bound to allege it and the onus would be on him to show that the 2nd defendant's conduct disentitled him to the protection which alienees from executors are entitled under the law. If therefore the 1st defendant was at the date of the sale entitled to exercise the power of executor, the sale must be upheld. But it was argued by Mr. T. M. Krishnasami Aiyar for the appellant that as probate had not been obtained of the will or letters of administration taken out with the will annexed, the 1st defendant could not exercise the powers of an executor. He urges that the property of the deceased testator would vest in the 1st defendant only if and when he took out probate of letters of administration and as he never did so, he never became possessed of the status and powers of an executor. We are unable to uphold this contention. There is no provision in the Probate and the Administration Act which requires a person appointed as executor under a will to take out probate or letters of administration. Section 187 of the Indian Succession Act which provides that no right as legatee or executor under a will can be enforced unless probate or letters of administration have been taken out, has not been enacted in the Probate and Administration Act. It was imported into the Hindu Wills Act but it was apparently for very good reasons considered undesirable to embody it in the Probate and Administration Act. Under Sec. 4 of the Act all the property of the deceased vests in the executor; as such probate is not necessary to make a person an executor. His title is derived under the will. If Sec. 187 of the Succession Act had been imported into the Probate and Administration Act, then neither the executor nor any persons claiming as alienees

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under him would be entitled to enforce any right as executor or alienee. But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate. This was the view taken in *Sheik Mossa* v. *Sheik Essa*,[1] and *Mathuradas Lalji* v. *Madhowji*.[2] In the former case *Sarjeant*, C. J., states that the law is the same in this country as in England as to the title of an executor to the property devised by a will; that probate is regarded as the authentic evidence of the will itself, from which the executor deriving his title and by virtue of which the property vests in in him from the death of the testator, from which time the executor would be entitled to collect the debts due to the deceased. Mr. Krishnaswamy Aiyar has referred us to a case *Sarat Chandra Banerjee* v. *Bupendra Nath Basu*[3], but the question in that case was as to the validity of a sale made by an executor under a Hindu will in the year 1864, long before the Probate and Administration Act was passed. It was contended on hehalf of the alienee that the acts of the executor were as valid as if they had been done after Act V of 1881 had come into force. Reliance was placed on Sec. 2 of Act V of 1881 which lays down that "Chapters II to XIII both inclusive of this Act shall apply in the case of every Hindu, Mahomedan, Buddhist and of every person exempted under Sec. 337 of the Indian Succession Act of 1865 dying before or after the said 1st day of April 1881." The argument was that as the provisions of the Act applicable to the case of a Hindu dying before April 1881 executors under the will in question had the powers given by the Act. It would probably have been quite enough to observe in answer to such an argument that no person could in 1864 have powers which were given to an executor only in 1881, though some other provisions of the Act of 1881 might be applicable to wills made before that date for instance probate of a will made before 1881 could be obtained under the provisions of that Act. Before Probate and Administration Act was passed, when there was no provision for granting Probate or Letters of Administration with respect to Hindu wills, the position of a Hindu executor was taken to be that of a mere manager and not of one in whom the legal estate in the properties of the deceased vested. Whether by virtue of Sec. 4 of Act V of 1881 the property of the deceased could be taken to have vested immediately on the death of the deceased, in a person appointed as executor by a will made before 1881, it is unnecessary to consider. But apparently the learned Judges who decided the case regarded

1. (1884) I. L. R. 8 B. 241. 2. (1886) I. L. R. 10 B. 468.
3. (1897) I. L. R. 25 C. 103.

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the executor's powers as depending on the question whether title vested in him on the death of the deceased. There are no doubt observations to be found in the judgment of these learned Judges which would show that in the case of a Hindu dying before 1881 if the executor or administrator should wish to get the benefit of Sec. 4 of the Act he should come in and prove the will and take out Probate or Letters of Administration and references made to the preamble of the Act and the heading of Chapter II in which Sec. 4 is to be found, the preamble stating that it is desirable to provide for the grant of the Probate of Wills and Letters of Administration to the estate of certain persons and the heading of Chapter II being 'grant of Probate, and Letters of Administration.' The inference is apparently drawn that a party could obtain the benefits of the provisions of the Act only on obtaining Probate or Letters of Administration, but this inference, so far as the decision is concerned, is expressly limited to the case of a Hindu dying before April 1881. We cannot assume that the learned Judges would have taken the same view with respect to wills made by a person who died after 1881. If the learned Judges had taken the view, which we do that no executor could before 1881 claim powers which were for the first time given by that Act, they would probably not have considered it necessary to rest their decision on the ground that a person who did not take out probate of the will of a testator who died before 1881 could not claim the benefit of any of the provisions of the Act. We do not think that either the preamble or the heading of Chapter II requires such a construction to be put on the words of Sec. 4. That section certainly does not relate to the grant of probate and would be beyond the scope of the heading and the preamble; the fact is that the Act contains many provisons which would not strictly come within either. The 1st defendant in this case, in our opinion had as an executor the power to sell the estate for the purposes of administration, and the 2nd defendant must be protected in the absence of any allegation that he was a *mala fide* purchaser having knowledge that the sale was not made in due course of administration. In the result therefore the decree of the Appellate Court must be affirmed but in the circumstances of the case we shall make no order as to the costs of the 2nd appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Appeal from the Calcutta High Court.]

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Musammat Bhawani Kumar ... *Plaintiff.* (*Appellant.*)*

v.

Mathura Prasad Singh ... *Deft. No. 1.*(*Respondent.*)

Bengal Land Revenue Sales Act—Incumbrances, meaning of—Court Sale and subsequent revenue sale—Competing titles of mortgagee purchaser and revenue purchaser—Mortgagee purchaser's right to use his mortgage as a shield after his purchase.

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The effect of Section 54 of the Bengal Land Revenue Sales Act is that a revenue vendee takes nothing less nor more than what belonged to the former owner and it negatives the idea that it is open to an owner to protect himself as by "a shield" against the consequences of the full transfer to him by his purchase by keeping his incumbrance alive against the revenue vendee.

A mortgagee who purchases the mortgagor's right in execution of a decree obtained by him on his mortgage cannot protect himself as by "a shield" against the consequences of the full transfer of ownership to him against a purchaser in revenue sale held for arrears of revenue accrued due subsequent to the date of the mortgagee's purchase.

The mortgagee purchaser cannot be permitted to say to the mortgagor that the ownership had been transferred to him on a certain date and to say to an outsider, like the Collector of Revenue, that the ownership had not been transferred to him.

It is unsafe to apply considerations as to the rights of prior and succeeding mortgagees and principles of keeping one's lien alive applciable between them to questions of title arising between a mortgagee—purchaser of the property and subsequent purchaser at a revenue sale of the same property.

A mortgagee brought a suit on his mortgage, obtained a decree and in execution thereof purchased the property on a certain day, (on 19th March 1900). A few days later *i. e.*, on the 28th March 1900, the Government Revenue on it fell into arrears and the property was sold for arrears of revenue.

Held, on the question of the competing titles between the mortgagee-purchaser and the revenue purchaser that the mortgagee-purchaser could use his mortgage as a shield against the revenue purcharser.

(2) That the mortgagee—purchaser took the property on the date of sale subject to all its liabilities.

(3) That the revenue purchaser was entitled to the possession of the property as against the mortgagee—purchaser.

(4) That the mortgage was not an incumbrance within the meaning of Section 54 of Land Revenue Sales Act, Bengal, after the court sale.

(5) *Obiter*:—If there had been any accretions to the property between the date of court sale and the date of confirmation they would have become the property of the mortgagee—purchaser

*22d July 1912.

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Appeal from the High Court of Calcutta, setting aside a decree of the Subordinate Judge of Gaya.

L. DeGruyther, K. C., and *Lowndes* for appellant.

G. E. A. Ross for respondent.

Their Lordship's judgment was delivered by

Lord Shaw.—This is an appeal from a judgment and decree of the High Court of Calcutta, dated the 10th January 1908, which set aside a decree of the Subordinate Judge of Gaya in Bengal, dated the 27th January 1905.

The suit was brought by the appellant as plaintiff to obtain possession of a certain share, amounting to 5 annas 1½ pies, in four villages in the Gaya District, which are named in the plaint. The appellant's rights are those of a purchaser who bought these properties at a revenue sale,—that is to say, a sale for arrears of revenue. The appellant pleads that he has received, in his character of purchaser and as from the date of sale, a right which cannot be defeated by the respondent. The respondent was a mortgagee holding a security over the property for money lent thereon, and in respect of his loan the property was sold in execution to him. It is out of this conflict between the rights of the former, who may be called the revenue vendee, and the latter, who was mortgagee and purchaser at the execution sale, that the suit has arisen.

As their Lordships are unable to agree with the views which have been taken with regard to this case, either by the Subordinate Judge or by the High Court, it is necessary to mention certain dates which are material, and to test crucially what were the rights of parties at those dates.

On the 9th August 1886, a mortgage for Rs. 5,000 was granted in favour of the respondent over the shares aforesaid of four out of seventy-one villages. On the 31st May 1899, the respondent obtained a decree on his mortgage bond, which was made absolute on the following 19th December. He executed his decree, a sale in the ordinary course took place, and on the 19th March 1900, which is the first important date in the case, the mortgaged property was sold, and it was purchased by himself, the mortgagee.

Nine days thereafter, namely, on the 28th March 1900, the March instalment of Government revenue on the 71 villages, amounting to Rs. 1,554, fell into arrear, and the whole, including the four which had just been purchased by the mortgagee, were notified for sale

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by theCollector. The situation of matters accordingly then was that, so far as the ownership of the property was concerned, a transaction of sale thereof in favour of the mortgagee as purchaser had in point of fact taken place, and this at a time when by the use of the ordinary information available as public facts, or upon enquiry with regard to the property purchased it would have been found that the period of the falling due of revenue was almost at hand, and that proceedings preliminary to a sale in respect of arrears then left unpaid would inevitably be commenced.

The mortgagee, however, did not pay the revenue which fell due at the end of March. Without doing so, he went forward with proceeding to get the sale to himself in execution of the mortgage confirmed. On the 23rd April he obtained a certificate confirming the sale, the certificate bearing that he " has been declared the purchaser at sale by public auction on the 19th March, 1900......and that the said sale has been duly confirmed by this court on the 23rd April 1900."

It was maintained in argument for the mortgagee that the true meaning of this was that the sale to him did not become a legal fact until the 23rd April. In their Lordships' opinion, this is an understatement and a misstatement of the mortgagee's rights. It is true that upon that date the sale was confirmed, but what was, as the certificate bears, confirmed, was a sale " by public auction on the 19th March 1900." There seems little reason to doubt that upon the 19th March all the lands sold had been transferred to the mortgagee, and that if there had been any accretions to the property between that date and the date of confirmation, those accretions would have become the property of the purchaser. On the other hand, there seems no legal principle which would leave un-transferred to the mortgagee any obligations which arose during the same period. Furthermore, if the properties which were the subject of sale were liable to attachment for sums due from the lands as revenue, and falling into arrear subsequent to the actual date of sale, namely, the 19th March 1900, it was not within the legal right of the mortgagee on the one hand to claim as against the mortgagor that the ownership of the property has been transferred, and at the same time to claim against the Government, or in respect of third parties unconnected with either mortgagor or mortgagee, that the mortgagor had not transferred the rights of ownership to the mortgagee, but himself remained in the position of owner. For the mortgagee to be permitted to say to the mortgagor that the ownership had been transferred, and to say to an outsider, like the Collector of Revenue,

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that the ownership had not been transferred, is a conclusion not supported by good sense and, in the opinion of their Lordships, they are not forced to it by any canon or rule of law.

If the date of sale be taken as the true and actual date in fact, which, in their Lordships' opinion, was, as explained, the 19th March 1900, it appears to their Lordships equally clear that what was in fact then sold was the estate itself and nothing other or less than this which might be denominated by terms "right, title, or interest" of the mortgagor only, or the like. And it would seem to follow as a necessary consequence that when the mortgagee thus became the purchaser and owner of the subjects mortgaged, he was not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, the position that his mortgage still remained an encumbrance thereon.

In their Lordships' opinion it is clearly unsafe to apply considerations as to the rights of piror and succeeding mortgagees to questions like the present. For in the present case no question arises as between a first and succeeding mortgagee, and no right or duty emerges with regard to the avoidance of an inequitable priority alleged to arise inferentially by acquisition of the estate. On the 19th March 1900, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such.

In these circumstances, when the 29th March 1900 was reached, the property which fell then into arrear of revenue and became liable to subsequent sale was the property in fact and in law of no one but the purchaser, namely, the mortgagee. It is admitted,—the concession was logically unavoidable,—that if at the sale on the 19th March the mortgagee himself had not purchased, but a stranger or outsider had, then such purchaser would have stood liable for the obligations accruing on the property and been responsible to Government for the payment of revenue and for the consequences which would ensue if the revenue fell into arrear. It seems somewhat difficult to discern why these consequences, which would be inevitable in the case of a stranger should be avoided because the mortgagee was purchaser himself.

The above considerations seem substantially to dispose of the whole case and lead their Lordships to a conclusion the opposite of that reached by the High Court, who think that it was possible for a mortgagee to maintain the ownership of the property in himself with an

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encumbrance which he should use to defeat, or, to use the terms which the learned Judges employ, as a "shield against" the rights of third parties.

Upon this subject it is true that the language of Sec. 54 of the Act No. XI of 1859—the Bengal Statute as to sales of land for arrears of revenue—provides that when a share or shares of an estate may be sold "the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." This provision, however, appears to their Lordships (1) to confirm the view that what is taken by a revenue vendee is nothing less nor more than what belonged to the former owner, and (2) to negative the idea that it is open to an owner to protect himself as by "a shield" against the consequences of that full transfer by keeping incumbrances alive against the revenue vendee. These incumbrances had become extinct and lost in the mortgagee's overriding right when he became the complete owner of the lands. To keep them alive as sought would introduce confusion into the mechanism of transfer and an insecurity into the rights in real estate which are not warranted by the Act.

Their Lordships will humbly advise His Majesty that the judgments of the Courts below be reversed, and that the plaintiff be declared entitled to the lands in suit in terms of the plaint, that possession be delivered to the appellant of the properties in dispute the possession of the respondent being removed, that the name of the plaintiff be caused to be entered in the Land Registration Office accordingly, the name of the defendant being expunged and his illegal possession removed, and that the cause be remitted to the High Court for the ascertainment of mesne profits for the period of dispossession up to the date of delivery of possession and for a decree therefor against the respondent. The respondent will pay the costs both here and in the Courts below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar.

Vathiar Ramanuja Aiyangar and others.	**Petitioners in both the petitions. (Appellants in Second Appeal No. 481 of 1912 on the file of the High Court.*
v.	
P. R. Aiyanachariar and others ...	*Respondents in both the petitions. (Respondents in Second Appeal No. 481 of 12 on the file of High Court.*

C. P. C. O. 41, rr 5 and 6 O. 39 r. 1—Jurisdiction—Stay when to be granted—Annoyance to feelings no ground.

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In an application for stay of execution the Court has to be satisfied that the appellant is likely to sustain substantial injury if execution is not stayed; and it is not usual to grant a stay if the appeal itself does not raise fairly arguable questions Mere annoyance to feelings cannot be a ground for a stay of execution, since pecuniary or tangible loss should be shown for justifying a stay.

In an application for a temporary injunction the Court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interests requires that an injunction should issue temporarily.

Quære:—Whether the High Court has jurisdiction to grant an injunction in the case; and whether when a party sues for a permanent injunction to restrain his opponent from doing a wrongful act, the opponent should have the right of restraining the plaintiff from doing the very act he claims to be entitled to do and himself be allowed to do the act which is objected to by the plaintiff.

C. M. P. No. 671 of 1912.

Petition praying for a temporary injunction restraining the respondents from taking the idol of Vedantha Desikar or any other through the Uttra, Chitra or Adayavalanjan Street within the seven enclosures of the Srirangam temple in pursuance of the decree of the District Court of Trichinopoly in Appeal Suit No. 499 of 1911, pending disposal of the second appeal No. 481 of 1912 preferred therefrom to the High Court.

C. M. P. 936 of 1912.

Petition for suspension of the injunction granted by the District Court of Trichinopoly in appeal No. 499 of 1911 (O. S. No 366 of

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1909 on the file of the District Munsif's Court of Srirangam) restraining the petitioners from interfering with the Respondents carrying Desigar through any of the said three streets within the seven enclosures of the Srirangam temple.

T. R. Ramachandra Aiyar and *T. Rangachariar* for petitioners in C. M. P. No. 671 of 1912, with *K. Parthasarathi Iyengar* in C. M. P. 936 of 1912.

K. Srinivasa Aiyengar and *C. Padhmanabha Aiyengar* for Respondents in C. M. P. No 671 of 1912

C. Padhmanabha Aiyengar for Respondents in C M. P. No 936 of 1912.

The Court made the following.

Order :—There are two applications before me for disposal. C. M. P. No. 671 of 1911 is an application by the appellants in the second appeal pending in this court for a temporary injunction to restrain the respondents from carrying the idol of Desikar in procession through any of the streets within the seven *Prakarams* of the Srirangam temple. C. M. P. No. 926 of 1912 is an application by the appellants to suspend the injunction granted by the Lower Courts restraining them from interfering with the Vadagalais carrying Desikar in procession through streets. The Vadagalais of Srirangam instituted a suit against the trustees of the temple and the Thengalais for a declaration of their right to carry the idol of Desikar, which they have apparently recently made, in procession through any of the 5, 6, and the 7th Prakarams of the Srirangam temple and for an injunction restraining the defendants from interfering with their right to do so. Their case was that the streets were public streets and that as members of the public they had the right they claimed. The defendants denied that the streets were public streets and contended that they belonged to the temple. They alleged also that even if the public had the right of passage through the streets such right was a restricted one, and that it was also contrary to the local usage that the Vadagalais should carry the Desikar idol in procession through the streets. Both the lower Courts held that the Vadagalais had the right to carry the idol in procession. With respect to C. M. P No. 671 I have had considerable doubts whether this court has jurisdiction to give the appellant an injunction of the sort they claim. The application would admittedly not come within the purview of rule 1 order XXXIX. The appellants' contention is that it would be allowable under the provisions of rule 1 of order XXXIX and that apart from that rule this

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court has inherent jurisdiction to give such an injunction for the protection of the right of a party in a matter in controversy before the court. It is pretty clear to my mind that the language of the rule would not allow an application of this kind. It cannot be said that there is any proceeding before this court in which the appellants' claim to restrain the respondents from doing a wrongful act, and that till the matter is tried it is necessary to give an interim relief of the kind which the appellants seek as the result of their appeal. It does also look to me somewhat extraordinary that, when a party goes to court claiming an injunction against his opponent to restrain him from doing something wrongful, the opponent should have the right as a matter of interlocutory relief to restrain him from doing the very act which he claims to be entitled to do and which he asks the court to be allowed to be done without obstruction from his opponent. No case was cited in which an application of this kind has been allowed nor am I aware of any. I do not wish however to express a definite opinion on this point as, in the view I take of the merits of the application, it is not necessary to do so.

The trustees of the temple were defendants in the suit in the court of first instance. They have not appealed against the decision of the District Court. The appellants here are the representatives of the Thengalai community. Excepting the question of the jurisdiction of the court, the question for decision in both the petitions may be taken to be substantially the same, though I do not say it would be precisely the same. In an application for a stay of execution the court has to be satisfied that the appellant is likely to sustain substantial injury by execution being allowed to take place before the disposal of the appeal. In an application for a temporary injuncaion, the court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interests requires that an injunction should issue temporarily. It is not usual for the court to grant stay of execution if the appeal itself does not raise fairly arguable questions, so that after all, there is not very much difference between the questions to be decided in either petition. Now in this case the lower courts have both found that the public have a right of way for carrying processions as well as for passing to and fro. I do not wish to express any definite opinion on the question whether the finding may not be open to legal objection. I observe that the District Munsif found that prior to the introduction of the Municipal Act of 1871 the temple was exercising considerable rights of ownership over the streets within the seven prakarams. The Munsif also observes that even now

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the temple exercises the right of shutting the outer gate of the 7th prakaram. The temple is also receiving *pala pattarai* fees. Whether the fees are received for the use of any of the streets within the seven prakarams or only of particular streets or portions thereof does not clearly appear. These, no doubt, are questions which might have a bearing on the decision of the second appeal. It is also urged that when the municipality took charge of the streets, the inconvenience of municipal control over the streets was recognised and it was expressly stated that regard should be had for the feelings of the people connected with the temple in exercising control. What exactly the effect of the reservation in the Government order allowing the municipality to take control of the streets would be, it is unnecessary to decide at present. There does not then appear to have been any question as between the respective rights of the Thengalais and the Vadagalais or of the trustees and the Vadagalai community of the place. Nor is it necessary to express an opinion on the question whether the reservation in the G. O. would make the dedication of the streets for the public use a partial dedication. The lower courts observe that after the municipality assumed control of the streets they have been treated as public streets in all respects. It is of course open to the appellants to argue that any act done by the municipality contrary to the ownership of the temple would not affect their rights as against the *Vadagalais*. The finding of the courts however is that there is nothing restricting the right of way that Vadagalais have over the streets as compared with the right that any one else has. Mr. Ramachandra Aiyar has argued that if the temple itself is the owner of the street it would be open to his clients to prove that any grant of lands to the occupiers of houses and any rights of way must be taken to be subject to any reservations which must be implied by the nature of the grant. A difference would however have to be made between the temple having ownership of the street and the streets being part of the temple itself. This again is a question that it would not be proper to go into at this stage. On the whole I am not prepared to say that the appellants have not got a fair case to argue in the second appeal. But has it been shewn that any substantial loss would be caused?. Admittedly no pecuniary loss would be caused. It is not alleged that the Srirangam temple itself would be desecrated by a Vadagalai idol being carried in procession. Practically it is admitted that the only injury that could be complained of is that the religious feelings of the Thengalai community would be outraged. It seems to me that where no pecuniary or tangible loss is shewn it would not be right to grant stay of execution merely on the ground of annoyance to the feelings of the appellants. An appellant very often is

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extremely annoyed that any decree against him should be executed before he has taken the opinion of the final court of appeal. He is particularly annoyed if his opponent is an enemy of his. If he belongs to a religious faction I take it that his annoyance would be still greater. I think it would be a sound rule to act upon that mere annoyance to feelings cannot be a ground to grant stay of execution. There is really nothing before me to shew that the idol of Desikar is an object of hatred according to the Thengalai cult or that Vedantha Desikar is regarded as an enemy of god according to the Thengalai persuasion. It is stated that in the Srirangam temple itself there is a shrine of Vedantha Desikar. I very much doubt whether the outrage would be to the religious feelings of the Thengalais and whether it would not be to their feelings against people whom they hate because they are Vadagalais. At any rate I am unable to hold that there is any injury that a court of law can take notice of which would be a sufficient ground for staying execution. It is no doubt true that the act of the *Vadagalais* would be an innovation as they have not had a Desikar idol to carry in procession until now. But I do not think that this would be a sufficient ground for staying the injunction. Moreover although I may stay the injunction the declaration of the plaintiff's right would stand uninterfered with by my order. On account of that declaration the Vadagalais would be entitled to exercise the rights which have been declared. The result then of my staying the injunction would be that the Vadagalais might still attempt to exercise their right to carry the Desikar idol in procession and the injunction being stayed the Thengalais would be at liberty to interfere with them. This is a condition of things which I think this court ought not to be responsible for by any order that it passes.

In the circumstances the only course open to me is to dismiss both the petitions.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[Appeal from the High Court at Madras.]

Present :—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Shamu Patter ... ... *Plaintiff.* (*Appellant.*)*

v.

Abdul Kadir Ravuthan and others *Defendants.* (*Respondents.*)

Shamu Patter *v.* Abdul Kadir Ravuthan.

T. P. A. S. 59—Attest—Jurisdiction of Court to frame necessary issue after argument—C. P. C. (Act XIV of 1882) S. 149.

The word "attest" in S. 59 Transfer of Property Act means the witnessing of the actual execution of a document and not as in S. 50 of the Succession Act the attestation of an acknowledgment of execution merely.

A court trying a civil case is competent to frame a necessary issue after the close of the arguments in the case.

S. 149 of Act XIV of 1882 empowers the court to amend the issues or frame additional issues and make all such amendments or additional issues as may be necessary for determining the controversy between the parties ; and even apart from the express provision in the Pode, every court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject matter of controversy between the parties ...

Consolidated appeals from two decrees and a judgment in *Shamu Patter* v. *Abdul Kadir*[1] of the High Court of Judicature at Madras, affirming the decrees of the Subordinate Judge of Palghat.

L. DeGruyther (with him *Mr. Kenworthy Brown*) for appellant.

Their Lordships' judgment was delivered by

Mr. Ameer Ali:—These are two consolidated appeals from certain judgments and decrees of the High Court of Madras, dated the 28th of January 1908, affirming the decisions of the Subordinate Judge of South Malabar at Palghat ; and the sole question for determination in both cases turns upon the meaning to be attached to the word "attested" in Sec. 59 of the Indian Transfer of Property Act (IV of 1882), the first clause of which provides that where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

The appellant, Shamu Patter, as the representative of one Appu, deceased, brought a suit on the 18th of July 1902 in the Court of the Subordinate Judge of South Malabar, to enforce a mortgage alleged to have been executed in favour of Appu by the Ravu-

*30th July 1912.

1. (1908) I. L. R. 31 M. 215.

than defendants. The other defendants to Patter's action were certain attaching creditors of the Ravuthans, who are respondents in the present appeals, and who challenged the mortgage on the ground, *inter alia*, that it was in fraud of creditors and without consideration. Their attachment on the mortgaged properties appears to have been partially removed at the instance of Patter, and they accordingly brought a suit some time in 1903 in the Court of the District Munsif of Palghat for a declaration that the mortgage transaction was fraudulent and without consideration, and ineffective so far as their rights were concerned. This suit was afterwards transferred to the Court of the Subordinate Judge and was tried with Patter's action, the evidence in one being taken as evidence in the other.

The trial began, as appears from the order sheet, on the 7th of September 1903; arguments were heard on the 16th and 17th of November, and judgment was reserved. On the same date, it appearing from the evidence of the witnesses to the mortgage deed that they were not present at its execution but had put their names on the document on the acknowledgment of the Ravuthans, the Subordinate Judge framed a supplemental issue in these terms; "Is it (meaning the mortgage deed) valid under Sec. 59 of Transfer of Property Act?" And on the 19th of November, holding that the document was invalid under that section, he dismissed Patter's suit (save as regards a personal decree against the Ravuthans) and by a separate judgment decreed the action of the creditors.

From these two decrees Patter appealed to the High Court of Madras, which has upheld the Lower Court's decisions.

In the present appeals the judgments of the Courts in India have been challenged on two grounds, first, that the Subordinate Judge acted irregularly and without jurisdiction in framing an issue after the close of the arguments and deciding the case on it; and secondly that the Courts are in error in holding that the word "attested" in Sec. 59 of the Transfer of property Act implies the witnessing of the actual execution of the document.

With regard to the first point their Lordships are of opinion that sec. 149 of the Civil Procedure Code (Act XIV of 1882) which is applicable to the proceedings, is conclusive. That section declares that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

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The first part of the section leaves it in the discretion of the Court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the Judge to frame such additional issues as may be necessary to determine the controversy between the parties. The Subordinate Judge was, therefore, fully empowered to frame the issue on which he decided the case.

Even had there been no such express provision in the Code, their Lordships consider every Court trying civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject matter of controversy between the parties.

The substantial ground, however, on which the decrees of the High Court are impugned, has reference to the interpretation put upon sec. 59 of the Transfer of Property Act. It is contended on the authority of *Grayson* v. *Atkinson*[1] and *Ellis* v. *Smith*[2] which was followed in 1829 in *White* v. *The Trustees of the British Museum*[3] that the learned Judges of the Madras High Court were in error in holding that the word "attested" in the section under reference means the witnessing of the actual execution of the document by the person purporting to execute it.

The construction put in those cases on the word "attested" occurring in sec. 5, cl. 3, 21 Car II (the Statute of Frauds) no doubt supports the contention of the appellant that attestation upon the acknowledgment of the executant is equivalent to being present at and witnessing the execution. They related, however, to the due execution of wills, and though the language of Lord Hardwicke in *Grayson* v. *Atkinson*[1] was sufficiently wide to cover other deeds, his interpretation has not passed without question in later cases. The eminent Judges who decided *Grayson* v. *Atkinson*[1] and *Ellis* v. *Smith*[2] themselves doubted the correctness as well as the expediency of widening the meaning of the word "attested," but felt overborne by authority. In the latter case the exact question for determination was whether a testator's declaration before three witnesses that it is his will is equivalent to signing it before them ; Chief Baron Parker began his judgment with the following important observation :—

> "I confess if this had been *res integra*, I should doubt whether the testator's declaration is a proper execution within the 5th clause ; because, I think, an admission that is sufficient tends to weaken the force of the statute, and let in inconveniences and perjuries."

Willes, C. J., observed that he was not satisfied in his own mind that the testator's acknowledgment was sufficient, but he added

1. (1752) 2 Ves. Sen. 454.
2. (1754) 1 Ves. Jun. 11.
3. (1829) 6 Bing 310.

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"authorities bear me down and I must yield." And the Master of Rolls pronounced extended construction to be "a dangerous determination and destructive of those barriers the statute erected against perjury and frauds." The learned judges, however, felt bound by the previous decisions, and proceeding on the principle of *stare decisis* decided in favour of the view now pressed before their Lordships regarding the construction of a section of the Indian Statute relating to a totally different subject.

As the question involved in these appeals is of considerable importance and there seems to be some divergence of opinion between the Indian High Courts, their Lordships do not desire to pass altogether unnoticed the authorities discussed at the Bar as well as in the well-reasoned judgments of the learned judges in the Madras High Court.

In *Casement* v. *Fulton* [1] which was decided in 1845, the question for decision was whether the signature of two witnesses who had subscribed a will at different times but the first acknowledged to the second that he had signed the same, amounted to sufficient compliance with the provisions of S. 7 of the Indian Wills Act of 1838. Lord Brougham, in delivering the judgment of the Judicial Committee, observed that :—

"The Statute of Frauds (29 Car II, Cap. 3) S. 5 requires the will to be signed by the testator in the presence of the witnesses ; nevertheless the construction put upon that important provision has been that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things, as different as the witnessing a fact or act and the witnessing a confession of that fact or act."

and after referring to the hesitation with which the decision had been arrived at in *Ellis* v. *Smith*,[2] refused "to carry one step further a construction which so great a wright of authority lamented and shewed to have been ill-advised in its inception."

The later cases are still more direct in the interpretation of the words "attestation" and "attested." In *Bryan* v. *White*[3] Dr. Lushington in 1850 laid down that "attest" means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." In 1855 Lord Campbell, Chief Justice, in *Roberts* v. *Phillips*[4] enunciated the same rule as regards the word "attested," that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in

1. (1845) 3 M. I. A. at p. 403.
2. (1754) 1 Ves. Jun. 11.
3. (1850) 2 Rob. (Ecl.) 315, 317.
4. (1855) 4 E. and B. 450.

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Burdett v. *Spilsbury.*[1] The Lord Chancellor summed up the conclusion in these words:—"The party who sees the will executed is in fact a witness to it; if he subscribes as a witness he is then attesting witness."

The meaning of the words "attest" and "attestation" has also been before the Courts under the Bills of Sale Act of 1878 (41 and 42 Vict, C. 31, SS. 8 and 11) and the interpretation put upon them in *Roberts* v. *Phillips*[2] and *Bryan* v. *White*[3] has invariably been followed.

S. 50 of the Indian Succession Act (X of 1865) was referred to in support of the appellant's contention regarding the meaning of the word "attested" in S. 59 of the Transfer of Property Act. The phraseology of the two sections is quite different, as different in fact as the objects of the two statutes.

S. 2 of Act XXV of 1838 (The Indian Wills Act) declared that after the passing of that Act 29 Car. II "shall cease to have effect" except to a limited extent within the territories of the East India Company. In S. 7 the word "attested" is left out, but it is provided that the testator's signature "shall be made or acknowledged by him in the presence of two or more witnesses present at the same time." The latter words gave rise to the question in *Casement* v. *Fulton.*[4] Act X of 1865 (The Indian Succession Act) has substantially taken the place of the Indian Act of 1838, and embodies the rules which constitute the law applicable in India to cases of intestate or testamentary succession, excepting as regards Mahomedans, for the major portion of this Act was made applicable to Hindus by the Hindu Wills Act. S. 50 provides for the due execution of what are called unprivileged wills and para 3 declares.—

> "The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary:"

It will be noted that the word "attested" which was omitted in S. 7 of the Act of 1838, is re-introduced in S. 50 and it is expressly provided that attestation may be effected on the acknowledgment of the testator. Had the word "attested" by itself conveyed the mean-

1. (1843) 10 Cl. and F. 340.
2. (1855) 4 E. and B. 450.
3. (1850) 2 Rob. (Ecll.) 315, 317.
4. (1845) 3 M. I. A. 395.

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ing that attestation upon the acknowledgment of the executant was sufficient there would have been no reason for making an express provision in the section. The inference to be drawn from it is obvious. The Legislature considered it expedient in the case of wills to permit of witnesses "attesting the document," in other words of testifying to its due execution, on the acknowledgment of the testator that it was in his hand, and as the word "attest" was not sufficient to validate such attestation, introduced an express provision to that effect. S. 68 of the Indian Evidence Act (I of 1872) which declares that "if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called on for the purpose of proving its execution" appears to their Lordships to indicate that the Indian Legislatures used the word "attested" in the sense in which it has been construed through a series of decisions in the English Courts. S. 59 of the Transfer of Property Act in requiring that in a certain class of cases a mortgage "can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses" could only mean that the witnesses were to attest the fact of execution. Any other construction in their Lordships' opinion would remove the safe-guards which the law clearly intended to impose against the perpetration of frauds.

The Calcutta High Court has in three cases arising under S. 59 taken the same view as the Madras High Court has expressed in the present case. And although in one instance the Bombay High Court had extended the meaning of the word "attested" to include attestation upon acknowledgment, in *Rama* v. *Laxman Rao*,[1] the learned judges on the authority of *Burdett* v. *Spilsbury*,[2] arrived at the same conclusion as the two other Presidency High Courts. The Allahabad High Court, however, in the case of *Ganga Dei* v. *Shiam Sundar*,[3] has taken a different view. The learned judges seem to consider the introduction of the words "personal acknowledgment" in S. 50 of the Indian Succession Act as an interpretation of the word "attest." They say as follows:—

"It seems to us reasonable to suppose that the interpretation put upon the word "attest" in that section, in the absence of good technical or substantial reason to the contrary, should be taken to be the meaning in which the word is used in S. 59 of the Transfer of Property Act."

With respect, their Lordships are wholly unable to follow the reasoning. As already observed, the provision as to attestation upon

1. (1908) I. L. R. 33 B. 44. 2. (1843) 10 Cl. and F. 340.
3. (1903) I. L. R. 26 A. 69

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the testator's personal "acknowledgment", was quite a separate condition and in no sense an interpretation of the word "attest." In fact, it was provided that the witnesses might attest the document on witnessing the actual execution or on the personal acknowledgment of the testator of the execution. But that in their Lordships' judgment, affords no warrant for extending the meaning of the word "attest." Nor do their Lordships agree with the view expressed by the learned judges regarding the policy of placing a larger construction on the word in consequence of the "social institutions of the country." Those very institutions their Lordships consider make it necessary that "the barriers against perjury and fraud," to use the language of the Master of the Rolls in *Ellis* v. *Smith*,[1] should not be removed upon speculative considerations.

On the whole their Lordships are of opinion that the judgment of the High Court of Madras is right, and that these appeals ought to be dismissed and they will humbly advise His Majesty accordingly.

Solicitor :—*Mr. Douglas Grant* for the appellant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Rama Iyengar ... ... *Appellant.* (*Plaintiff*).*

v.

Mannar Iyen, Kasinivenda Aiyangar. *Respondent.* (*Defendant*).

Well—Joint or part ownership in—Pleader's acquiescence in erroneous view of law by court, not binding on party—Evidence Act S, 13—Deeds evidencing transaction relating to suit property, evidentiary value of.

Rama Iyengar *v.* Mannar Iyen.

There may be ownership in a well in different persons though it might stand on property belonging to one of them only.

A pleader's acquiescence in an erroneous view of the law by the Court that there can be no part ownership in a well is not binding on the party.

Transactions by a party, dealing with the property to which he lays a claim are important evidence of his title ; and sometimes, they constitute the only evidence of title available.

Second appeal from the Court of the Subordinate Judge of Tuticorin in A. S. No. 320 of 1908 preferred against the Court of the District Munsif of Tuticorin in O. S. No. 219 of 1907.

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1. (1754) I. Ves. Jun, 11.

*S. A. No. 287 of 1911. 16th August 1912.

Rama Iyengar v. Mannar Iyen.

The suit was brought by the plaintiff for what he called ¼th share of a well and for an injunction. The District Munsif decreed the suit. The Subordinate Judge on appeal thought that the claim for a fourth share in a well was unknown to law, that the claim could only be for an easement. He further held on the facts that the plaintiff did not make out any title, that an Inam Register evidencing transactions like sales, mortgages, etc., by the plaintiff and his predecessors in title of his ¼th share in the plaint well were no evidence against the defendant and that as an easement there was no user as of right and he therefore dismissed the suit. Hence the second appeal.

S. *Srinivasa Aiyar* for appellant.

T. *Rangaramanujachariar* for respondent.

The Court delivered the following

Judgment:—The Subordinate Judge's judgment is entirely unsustainable. He begins it with the observation. "It is meaningless to talk of ¼th share in a well situate in another's property or an easement to take water in it to the extent of a share." We are quite unable to understand the Subordinate Judge's difficulty in realising that there may be ownership in a well in different persons though it might stand on property belonging to one of them only. The plaintiff's case clearly was based on ownership of a portion of the well. We cannot hold that the plaintiff was bound by the pleader's acquiescence in the view of the law taken by the Subordinate Judge, that there can be no part ownership in a well. The Subordinate Judge ought to have dealt with the case on the footing on which it was put forward by the plaintiff.

The Subordinate Judge was also mistaken in supposing that the plaintiff claimed title under a gift to his grandmother. On the other hand the defendant admitted in the Munsif's Court that Chellam Janiki sold the share of her husband Kuppana Aiyangar in the well in question to the plaintiff's grandmother. No reference is made to this admission in the judgment of the Subordinate Judge. Again the Subordinate Judge says there is no justification for assuming that Exhibit H. recognises the right of the family to one half of the well in question because he thinks that a half share could not have been allowed to the branch of the family descended from Kuppana Aiyangar through his second wife. But it is quite possible that at the time when the compromise decree Exhibit H. was passed the parties acted on the footing that the sons by one wife would be entitled to an equal share with the sons by another. The Subordinate Judge was apparently of opinion that Exhibit did not refer to

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the family of the parties at all. It is, to say the least, extraordinary, then, that all the names in that document should be the names of members belonging to the family. He admitted Exhibits V, VI and VII in evidence in appeal. The result of this was to introduce confusion into the facts of the case, for, as pointed out by the Subordinate Judge Exhibit V. tends to show that the family continued undivided in 1864. There must be some explanation of the difference in the position of the family as disclosed by Exhibits H and V. This explanation the Subordinate Judge was not in a position to have, because he did not give an opportunity to the plaintiff to rebut this inference suggested by Exhibit V. We do not know why Exhibit V. was not filed in the court of first instance by the defendant. The Subordinate Judge says the admission of Exhibits V, VI and VII was not objected to by the plaintiff. We do not, therefore, go to the length of holding that he ought not to have admitted these documents at all. But an opportunity ought to have been given to the plaintiff to adduce fresh evidence on the points on which Exhibits V, VI and VII had a bearing. The Subordinate Judge, was also, apparently of opinion that Exhibits C. and E were not admissible in evidence against the defendant. He also observes that Exhibit E was not proved. But we observe that, although it was acted on by the District Munsif, no objection was taken to its admission in the memo of the appeal in the lower appellate court. Transactions by a party, dealing with the property to which he lays a claim are important evidence of his title and sometimes they constitute the only evidence available. The question with which the Subordinate Judge mainly dealt with was the plaintiff's right to an easement. That was not the right claimed by the plaintiff. The Subordinate Judge no doubt makes some observations on the question of title, but these, observations are also vitiated by the other errors we have pointed out. On the whole we consider it necessary that the whole appeal should be re-heard.

We set aside the decree of the Subordinate Judge and remand the appeal for fresh disposal according to law. As additional evidence has been already received in appeal, both parties must have leave to adduce fresh evidence. The costs in this court will abide the result.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court at Allahabad.]

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Lala Fateh Chand and others ... (*Plaintiffs*). *Appellants.**

v.

Rani Kishen Kunwar ... ... (*Defendant*) *Respondent.*

C. P. C. S. 100—Question of law—Misconstruction of document—Wrong inference—Wazib-ul-arz—Evidentiary value.

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The right construction of documents is a question of law which Judges in second appeal are not by Ss. 584, 585 C. P. C. (XIV of 1882) precluded from considering by any finding of the lower appellate court, based upon such documents.

Where the lower appellate court arrived at a finding by inferences drawn upon an incorrect construction of the wazib-ul-arz;

Held:—That the Judges in second appeal were not bound by the finding.

The wazib-ul-arz is cogent evidence of the rights as they existed when it was made of those holding proprietory or other rights of property within the Mauza.

This was an appeal by special leave, from a judgment and decree of the High Court of Judicature for the North Western Provinces at Allahabad, dated the 7th of November 1906.

Bhagwandin Dube for appellant.

E. Richards for respondent.

Their Lordship's judgment was delivered by Sir John Edge.—This is an appeal by special leave from a decree of the High Court of Judicature for the North West Provinces of India, dated the 7th November 1906, which reversed the decree of the Subordinate Judge of Aligarh, dated the 25th July 1904, which had set aside the decree of the Munsif of Etah, dated the 22nd September 1903, dismissing the suit with costs.

The suit which related to the proprietory title to lands in Rampur was brought in the Court of the Munsif of Etah by Lala Fateh Chand, since deceased, and others against Rani Kishen Kunwar and others to obtain the cancellation of an order of the 4th of January 1902 of a Court of Revenue; for a declaration that the plaintiffs were the proprietors in possession of the lands in the plaint mentioned and as such were entitled to have their names entered in the revenue papers as proprietors; and for consequential reliefs. Some of lands in question consisted of lands in the *abadi* of Mauza Rampur. Upon those lands in the *abadi* houses had formerly stood. It is not

*12 th July 1912.

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clear from the record whether or not all of those lands in the *abadi* had been cleared of houses and had been brought into cultivation, but apparently they had been brought into cultivation before suit. It is, however, not necessary to ascertain whether or not all of those the lands in the *abadi* had been brought into cultivation as it is the proprietary title to the land, whether covered with houses or not, and not the title to the houses, if any, standing upon those lands which is in question in this suit. The remainder of the lands to which the suit relates were lands under groves. Rani Kishen Kunwar was the Zamindar of the whole Mauza Rampur, and she alone defended the suit. By her written statement Rani Kishen Kunwar put in issue the alleged title of the plaintiffs as proprietors.

Fateh Chand, the deceased plaintiff had applied to the Revenue Court to have his name entered as that of the proprietor of the lands in question in the Revenue papers relating to Mauza Rampur. On the 4th January 1902, the Assistant Collector rejected that application with costs, and on the 9th January 1903 the plaintiffs brought this suit in the Civil Court. The Munsif of Etah having found as a fact that the Defendant, Rani Kishen Kunwar, was the Zemindar of Mauza Rampur, and that the plaintiffs, were tenants and were not proprietors of the lands in the plaint mentioned, by his decree of the 22nd September 1903, dismissed the suit.

From that decree of the Munsif the Plaintiffs appealed, and in their grounds of appeal alleged that they were the owners in possession of the plots in suit, and that in Khasra Rampur the Zemindar is not the owner of the *abadi*, but the lower class of people, who are her ryots, are the owners. The plaint and the ground of appeal to which their Lordships have referred put it beyond doubt that the title which the plaintiffs claimed in the Munsif's Court and an appeal from the Munsif's decree was the proprietory title to all the lands mentioned in the plaint, and was not any inferior title. The Subordinate Judge of Aligarh in the appeal found on his construction of the *Wajib-ul-arz* and other documentary evidence that the plaintiffs were the owners of the lands in respect of which the suit was brought, and by his decree declared that the plaintiffs were the owners in possession of the property, and decreed the plaintiff's claim From that decree of the Subordinate Judge, the defendant, Rani Kishen Kunwar, appealed to the High Court of Judicature for the North West Provinces of India at Allahabad.

At the hearing of the appeal in the High Court it was urged in argument on behalf of the plaintiffs that the appeal being a second

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appeal to which Ss. 584 and 585 of the Code of Civil Procedure applied the High Court was bound to accept as conclusive and was precluded from questioning the correctness of the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands in respect of which the suit was brought. Sir George Knox and Richards, JJ., who heard the Appeal, over-ruled the objection, and on their construction of the *Wajib-ul-arz* and other documents in the suit in their judgment stated and found :—

"From the judgment of the lower Appellate Court it appears that it is founded on inferences of law drawn by the learned Subordinate Judge from certain documents and the *Wazib-ul-arz* which were given in evidence. The documents show that the owners of houses in Rampur had been in the habit of selling and transferring their houses. The *Wazib-ul-arz* sets forth that the occupiers of houses had this power, but all through the entries the Zemindar is recognised, and it is stated that if a new house is to be built the permission of the Zemindar must be obtained. The entry in the *Wazib-ul-arz* as to groves is to the effect that isolated trees and clumps of bamboos planted by the tenant can be cut by him, and as to rent free groves if the trees should die out and the land be brought into cultivation, rent must be paid, and that if a new grove was to be planted the leave of Zemindar must be obtained. The inference of law that the Subordinate Judge has drawn from this evidence (about which there is no dispute) is that the occupiers of the groves and of the land which had been the sites of the houses were the absolute property of the persons who occupied and used them. In our judgment the inference is a wrong and impossible inference and the decision of the learned Subordinate Judge based thereon is clearly wrong."

The High Court by its decree allowed the appeal and restored the decree of the Court of the Munsif. From that decree of the High Court this appeal to His Majesty has been brought. The principal ground of this appeal is that the decree of the Subordinate Judge is right and that the plaintiffs are the owners of the land in dispute.

On the hearing of this appeal the learned counsel on behalf of the appellants contended that the Judges of the High Court should have accepted the findings of the Subordinate Judge on the question of title as correct and as binding on them in second appeal and were not at liberty to find that the plaintiffs were not the proprietors of the land in question. He also contended that the Judges of the High Court had misconstrued the *Wajib-ul-arz* and the other documentary evidence and had come to a wrong conclusion. He further contended that the *Wajib-ul-arz* of Manya Pampur which was made in the settlement which commenced in 1872 and extracts from which are on the record of this suit, cannot be treated as applying to the *abadi Mauza Rampur,* the contention being that Rampur, owing to the number of its inhabitants, many of whom are not agriculturists, and owing to the fact that the Government has applied the Chaukidari Act (Act No. 20 of 1858) to Rampur,

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must be regarded as a town and not as a purely agricultural village, to which according to the learned counsel's contention, a *wajib-ul-arz* is alone applicable. The answer to that contention that the *wajib-ul-arz* does not apply to the *abadi* of Mauza Rampur appears to their Lordships to be that the *wajib-ul-arz* to which reference has been made was prepared by the Settlement Officer for the whole Mauza Rampur including the *abadi*, and that all those who were interested were at the time given the opportunity of objecting to the statements contained in it, and further that the Government by applying the Chaukidari Act to Rampur did not alter and could not have altered proprietory rights in Mauza Rampur or in any part of the Mauza. The *wajib-ul-arz* is in their Lordships' opinion cogent evidence of the rights as they existed when it was made of their holding proprietory or other rights of property within the Mauza, and it has not been shown that the *wajib-ul-arz* to which reference has been made in this suit differs in any material respect from the *wajib-ul-arz* which their Lordships have been informed by Counsel was made in the more recent settlement.

The Judges of the High Court rightly overruled the objection that they were bound to accept as correct the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands to which this suit referred. That finding of the Subordinate Judge was the result of his having misconstrued the *wajib-ul-arz*. The right costruction of documents is a question of law which judges in second appeals are not by Ss. 584 and 585 of the Code of Civil Procedure, precluded from considering by any finding of a lower Appellate Court, based upon such documents. The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the *wajib-ul-arz*, and the Judges in second appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the lands.

In the *Wajib-ul-arz* it is stated that Mauza Rampur "is a mahal of Zamindari Khalis (held by a single person), and Raja Ram Chandar Singh is the only proprietor without any co-sharer." Raja Ram Chandar Singh was the husband of the defendant, Rani Kishen Kunwar, the present Zamindar. There is no documentary evidence to show that the plaintiffs or their predecessors in title ever were proprietors of any of the lands to which this suit relates; on the other hand, the *Jamabandi* shows that predecessors in title of the plaintiffs paid rent as tenants for some of those lands, and in the *Khasra* for 1297 Fasli the defendant, Rani Kishen Kunwar, is

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entered as the proprietor of some of these lands, and predecessors in title of the Plaintiffs are entered as the tenants. The Zemindar was not affected by any transfer of lands to which he was not a party, and in the *Wajib-ul-arz* neither the plaintiffs nor any predecessors of theirs are shown as tenants who had special rights which were heritable and transferable.

The following paragraphs of Chapter IV of the *Wajib-ul-arz* relate to groves and houses, and are important:—

Paragraph 3—Relating to the rights of tenants in respect of groves and scattered trees.

A tenant has power to cut down the grove or the scattered trees planted by him in his neighbourhood.

If the land is rent-free and the trees have been removed therefrom and the land is brought under cultivation, the tenant shall have to pay the rent. If in future a grove is planted, it can be planted with the permission of the Zamindar.

Paragraph 4—Relating to the rights of the tenant in respect of the houses in the village and of those which are built.

A person residing in a house is owner thereof and he has power to transfer it, but in future a new house shall be built with the consent of the Zamindar.

The tenants of the lower class have no power to transfer their houses.

There is evidence on the record that when land in the *abadi* is brought under cultivation the tenant has to pay rent for it. In their Lordships' opinion the judges of the High Court rightly construed the *Wajib-ul-arz* and drew the legitimate inference from it, and the other documentary evidence in the suit.

On behalf of the plaintiffs—appellants in their appeal the learned counsel who appeared for them pressed their Lordships to advise that the plaintiffs—appellants should be declared to have heritable and transferable right in the lands in suit and for that purpose admitted that the plaintiffs—appellents were tenants of those lands. Apart from other considerations it is sufficient for their Lordships to say that that is not the claim in respect of which this suit was brought.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed and the decree of the High Court be affirmed. The appellants must pay the costs of the appeal.

Solicitors.—*Barrow Rogers & Neill* for appellants.

Solicitors.—*Summerhays & Sons* for respondent.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

Present:—Mr. Justice Wallis.

Cotha Krishnasawmy Chetty ... ... *Plaintiff*.*

and

Sitaram Chetty and another ... ... *Defendants*.

Krishnasawmy Chetty v. Sitaram Chetty.

Evidence Act S. 115, not exhaustive—Estoppel—Blowing hot and cold.

S. 115 of the Evidence Act is not exhaustive. A defendant who obtains judgment upon an allegation that a particular obstacle exists to the plaintiff's suit cannot in a subsequent suit based upon such allegation deny the truth of his former allegation.

Where the defendant in resisting an application against him stated that he did not deny his liability and he was willing to pay the plaintiff his dues, but objected to the relief being granted to the plaintiff in that particular application, cannot afterwards turn round and plead in a suit brought for the purpose that long before the date of the plea in the prior proceeding the suit had become barred by limitation.

T. R. Ramachandra Aiyar for plaintiff.

K. Srinivasa Aiyangar and *C. P. Ramaswami Aiyar* for defendants.

Judgment:—This is a suit instituted by the plaintiff to recover certain instalments due on a bond which was executed in his favour by the defendants under an award made in a dispute between the plaintiff and the defendants as to the share which he was entitled to in their business. Under the award the defendants executed a promissory note, which is Exhibit A dated 12th December 1904, by which the sum of Rupees Thirty thousand (Rupess 30,000) only, interest at 9 per cent. per annum was payable by monthly instalments of Rs. 1,000/-, the first instalment being due on the 15th January 1905, and each instalment being payable with interest on the unpaid portion of the principal. If the amount of three instalments be allowed to fall into arrears, the balance of principal and interest then due shall at once be recoverable without reference to the aforesaid provision for instalment."

The defendants duly paid the instalments under the bond including the instalment of May 1906. But the cheque they sent was returned to them. Then they wrote to the plaintiff a letter Exhibit C, dated 13th May 1906, enquiring the reasons for the refusal; and in answer to that, the plaintiff's solicitors wrote Exhibit

*O. S. No. 53 of 1910. 5th August 1912.

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D of the 22nd May 1906, in which they said that the whole settlement was a fraud upon the plaintiff and that he was not going to be bound by it. Again in June 1906 the defendants appear to have tendered the instalment for that month which was returned to them and in July they wrote the letter—Exhibit E—mentioning the previous two instalments have been returned, and asked whether the plaintift "would not in future receive payments tendered for the instalments of the bond, so that we may cease to go through the farce of sending a cheque every month, only to be returned." To that letter they received no answer but in the following month a suit was filed by the plaintiff to set aside the whole award and recover the share of the business to which he claimed to be entitled. That suit was eventually dismissed by a decree of the Appellate Court. Then the plaintiff demanded the payment which was due to him under the instalment note but payment was refused; when the present suit was filed the defendants pleaded that the claim had become barred by limitation. Now, the plaintiff contends in this suit, in the first place, that the suit had not become barred either wholly or in part, both of which contentions were urged by the defendants. Secondly, the plaintiff says that the defendants are estopped from raising this contention of what passed in Court on the delivery of the judgment of the Appellate Court.

[His Lordship after dealing with the questions of waiver and limitation which are not necessary for the purpose of this report proceeded as follows as regards the question of estoppel. Ed.]

I will now deal with the second part of the case whether the defendants are estopped by reason of what passed when the appellate court's judgment was being delivered, from setting up this bar of limitation at all when judgment came to be delivered in the Appellate Court confirming the decree of this court dismissing the plaintiff's suit. His Vakil applied that at any rate, judgment might be given for him in that suit for the amount of the unpaid instalments on the promissory note which is the subject of this suit. Now, the defendants might have, perhaps did, argue that it was not open to the appellate court in that suit to grant any such relief and that no such relief ought to have been granted. They did not, however, stop there. For the purpose of inducing the appellate court to reject that application they stated, through their Vakil, that, to use the words of the judgment. "The defendants do not deny their liability to pay and they submit they have been always ready and willing to pay but they contend that no decree should be passed in this suit." Now it was perfectly open to the defendants to

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submit that no decree should be passed in that suit against them on this instalment bond. But was it open to them, for the purpose of getting that application rejected, to state to the Court they did not deny their liability and had always been ready and willing to pay and then when they got application rejected upon that basis as soon as ever they were asked to pay to turn round and plead that before that application had been made the suit had become entirely barred. No precedent has been cited before me which exactly corresponds to this case; probably I cannot help thinking because, rarely, if ever, have defendants taken so ill-advised a course as they have taken in this case. It seems to me that it would be a lamentable thing if it were open to parties to play fast and loose with the court in this manner. It may very well be that if the defendants had made no admission at all, exactly the same result would have followed and the application would have been dismissed. But I am not the appellate court, I cannot put myself in their place. I cannot say what effect it might or might not have had upon the court if no such admission had been made. I know that the admission was made in the defendant's interest with regard to the application then before the Court and that they authorized the eminent Vakil who appeared for them to make it, though even that is challenged in the pleadings. One knows very well that Mr. Sundara Aiyar would never have made such an admission unless he had been authorized to make it. As I already said, I find myself in this position, that it is impossible for me to say whether the result of the application would have been the same if no such admission had been made.

Mr. Ramachandara Aiyar endeavoured to bring this case within the wording of Section 115 of the Evidence Act. I confess I find some difficulty in following him. But that is, by no means an exhaustive exposition of the law of estoppel. And in such a case as this we can. with advantage, I think, refer to the very learned and authoritative treatise of Mr. Bigelow, a high authority not only, in this in other branches of law. In his treatise on the Law of Estoppel, I find that he does not refer to any case precisely like this, because, as I am inclined to think happily, no such case could be found where parties had gone back in this unblushing way on the admissions which they make to the Court,—yet, but the principles which he lays down appear to me to cover the case and if any precedent is wanted I am prepared to make one. Now at page 117 Mr. Bigelow deals with what he calls "Inconsistent Positions in Court" and he says "If parties in Court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of Courts of Justice would in

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most cases be paralyzed; the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the Courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot play fast and loose. Thus if counsel seeks to amend his pleadings and his request is granted upon a condition, and the amendment made accordingly, he cannot thereafter object to the condition; supposing at all events that it was competent to him to accept it." Then he gives some other authority. He goes on to say that " the principle under consideration will apply to another suit than the one in which the action was taken, where the second suit grows out of the judgment in the first. It is laid down that a defendant who obtains judgment upon an allegation, that a particular obstacle exists cannot in a subsequent suit based upon such allegation deny its truth." It appears to me that it would be opposed to good conscience to allow defendants, who for the purpose of resisting an application against them have stated that they did not deny their liability and were always ready and willing to pay, to turn round immediately afterwards and allege that long before the date of their admission the suit had become barred by limitation. In my opinion there must be a finding for the plaintiff on the 3rd issue. " Are the defendants estopped from denying their liability as alleged in paragraph 17—C of the plaint ?" The result is that there must be a judgment for the plaintiff.

There is another question as to interest, namely, whether in view of the action of the plaintiff in returning the instalments, interest should run against him. It is not contended that there was anything that amounted to a true legal tender of these instalments and that being so I must decide, following a decision of my own in which the point was discussed in (C. S. 53 of 1907), that interest will continue to run. There must therefore be a judgment for the plaintiff for the amount claimed with interest and costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

Ariyaputhira Padayachi and others ... *Appellants.**

v.

Muthukumarasami and others ... ... *Respondents.*

Transfer of property Act, S. 54—Sale—" Price" meaning of—Evidence Act S. 92—Discharge of mortgage by oral sale of lands—Evidence, admissibility of—Exchange.

A usufructuary mortgagee held possession of plots A and B under his mortgage. In a suit for redemption by the mortgagor, the mortgagee pleaded an oral sale of plot A in discharge of the whole mortgage in consideration of his freeing plot B of the mortgage lien in favour of the mortgagor, and also pleaded in the alternative a prescriptive title to plot A as owner from the date of the said oral discharge of the mortgage.

Ariyaputhira Padayachi *v.* Muthukumarasami.

Held per Curiam—That the transaction was invalid for want of registration and that the suit for redemption was not barred.

Per *Miller* J :—The transaction was an exchange and required registration for its validity.

(2) The intention to discharge the mortgage involved the intention to make certain transfers and it was impossible to say that if those transfers failed both parties nevertheless intended to discharge the mortgage.

Per *Sadasiva Aiyar* J :—That the transaction amounted to a sale or an exchange ; that in either view it was invalid for want of registration.

A transfer of property in consideration of the discharge of a debt is a sale, and if not, at least an exchange.

The meaning of the word " price " dwelt on.

Tiruvengadachariar v. *Ranganatha Aiyangar* [1] not followed.

A mortgagee cannot by merely asserting possession as owner under an invalid sale of the equity of redemption subsequent to mortgage convert his possession as mortgagee into a possession as owner and thereby plead article 144 of the Limitation Act in answer to a suit for redemption.

Oral evidence is admissible to prove discharge of a mortgage by payment of money or by receipt of profits, but not to prove a discharge by an invalid oral sale of the equity of redemption in a portion of the mortgagee's property in discharge of the mortgage debt.

Second appeal from the decree of the District Court of South Arcot in Appeal Suit No. 359 of 1909, presented against the decree of the Court of the District Munsif of Chidambaram, in Original Suit No. 751 of 1908.

T. S. Krishnaswmi Aiyangar for *T. Narasimha Aiyangar* for appellants.

C. V. Anantakrishna Aiyer for respondents.

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* S. A. No. 2044 of 1910. 2nd May 1912.

1. (1903) 13 M. L. J. 500.

Ariya-puthira Padayachi v. Muthu-kumarasami.

K. S. Krishnasami Aiyangar, submitted that the case was one of adjustment and did not require writing and registration. It is neither a sale nor an exchange *Dinanath Dasik* v. *Matumator Dossya.*[1] S. 9 of the Transfer of Property Act provides that where the Act does not make writing necessary, writing shall not be necessary. *Tiruvengadachariar* v. *Ranganatha Aiyangar*[2] *Latchummal* v. *Gangammal,*[3] were cited. On the authority of *Karampalli Unni Kurup* v. *Thekku Vithil Mutharakutti*[4] *Kattika Bapanamma* v. *Kattika Kristnamma*[5] he contended that there having been a discharge of the mortgage of the transaction, such a discharge can be recognised in spite of S. 92 of the Evidence Act. Possession under the arrangement was adverse from the date of the arrangement, especially so as it was acquiesced in by the mortgagor.

C. V. Anantakrishna Aiyar submitted that it was an exchange or a sale and required registration. As to adverse possession he submitted the question could not arise in a suit under Art. 148. *Beari* v. *Puttanna*[6] *Khirajmal* v. *Daim*[7] *Bhagwant Govind* v. *Kondi.*[8]

The Court delivered the following.

Judgment:—*Miller*, J. I think the transaction alleged in this case to have taken place in 1892, may properly be held to be an exchange of property within the meaning of section 118 of the Transfer of Property Act, if it is not a sale. By it the mortgagee gave up his right to possession in part of the land mortgaged and the mortgage money due to him, and received the equity of redemption in another part of the land. Even if this transaction was made by way of a compromise of disputes, it is not suggested that it amounted merely to acknowledgment or adjustment of existing rights and the operations amounted, I think, to transfer of ownership in immoveable property. The arrangement was, therefore, invalid for want of a registered instrument and could not affect the title.

It is, however, contended that it may be proved as showing the intention of the parties to discharge this mortgage at that time, and so, as showing change in the nature of mortgagee's possession after the date of the arrangement, so as to make it adverse to the mortgagor. The intention to discharge the mortgage involves the intention to make certain transfers, and it is impossible to say

1. (1906) 11 C. W. N. 343.
2. (1903) 13 M. L. J. 500.
3. (1910) I. L. R. 34 M. 72.
4. (1902) I. L. R. 26 M. 195.
5. (1906) I. L. R. 30 M. 27.
6. (1890) I. L. R. 14 M. 38.
7. 8. (1904) I.L.R. 32 C. 296 P. C.
8. (1889) I. L. R. 14 B. 279.

that if those transfers failed both parties nevertheless intended to discharge the mortgage. The mortgagor, therefore, had 60 years for his suit under Art. 148 of the 2nd Schedule of the Limitation Act and he has come within that time.

The appeal therefore fails, and is dismissed with costs.

Sadasiva Aiyar J.—I entirely agree in the conclusion of my learned brother and in the reasons given by him for the said conclusion. But out of respect for the strenuous arguments advanced with great acuteness by the appellant's learned Vakil, I have thought it not improper to pronounce a judgment in my own words.

The facts and pleadings necessary to understand the contentions on both sides are shortly as follows:—Plaintiff sues for redemption of the plaint A schedule lands alone though both A and B schedule lands were usufructuarily mortgaged in 1885 by a registered instrument for Rs. 380-8-0. The plaintiff's allegation is that the B schedule lands were redeemed in 1893 by a payment of Rs. 203 and hence only A schedule land remained to be redeemed on payment of the balance of Rs 180-8-0. The contesting defendants (who represent the original mortgagee) pleaded (*a*) that the A schedule properties were "orally sold" to the mortgagee in consideration of Rs 1600 due to the mortgagee under the mortgage document of 1885 and some other documents (the written statement itself using the word "sold"); (*b*) that thus the mortgage document of 1885 was discharged and the mortgagee became full owner of the A. Schedule properties by the oral sale, while the mortgagor got back the B. Schedule property free of the mortgage charge and (*c*) that as the mortgagee and his assignees have been enjoying the A. Schedule lands as owners by adverse possession from 1892 for more than 12 years before suit, they have got a good title by prescription under Art. 144 of the second schedule of the Limitation Act.

The lower appellate court held that the mortgage contract created by a registered document of 1885 could not be rescinded by the alleged oral agreement or sale of 1892 and that under section 92 of the Indian Evidence Act, oral evidence was inadmissible to prove any such agreement. On this ground, the lower appellate court confirmed the Munsif's decree, allowing in plaintiff's favour the redemption of the A schedule lands. The defendants No. 2, 3, and 4 are the special appellants before us.

The contentions of the appellant's learned vakil were as follows:—(a) The oral sale of 1893 in respect of the A schedule lands set up by the appellants does not come under the definition of "sale" or "exchange" in the Transfer of Property Act. It is a

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peculiar "transfer" of property not covered by the Transfer of Property Act, Section 54, and such a transfer could be effected by oral agreement and does not require a written registered instrument to effect it, though the consideration for such a transfer and the value of the transferred property (roughly) have been Rs. 1600. (b) Even if the oral sale of 1892 is invalid to transfer the title to the A schedule properties to the mortgagee, it operated as a discharge of the mortgage debt of 1885 charged on both A and B schedule properties. Hence the mortgagee's possession of the A schedule properties ceased from 1892 to be the possession of a mortgagee and became the possession of a trespasser; more than 12 years' possession before suit as trespasser has conferred full title as owner on the mortgagee and his assigns. (c) Oral evidence can be given, notwithstanding section 92 of the Evidence Act, to prove that the obligation of the mortgagor to pay money under the mortgage has been discharged; such oral evidence need not be restricted to the evidence of the payment of money or its equivalent in moveables or choses in action or other personal property. Oral evidence can be given of an invalid sale, (invalid for want of a registered written instrument evidencing it) and such invalid sale could validly operate as a discharge of the mortgage deed, though ineffectual to transfer title.

As regards contention (a), I think it very improbable that the legislature, when enacting by the Transfer of Property Act, that a registered instrument is indispensable in the case of a transfer of land by sale (section 54) transfer of land by exchanges (section 118), transfer of land by gift (section 123), transfer of interests in land by way of lease (section 109), and transfer of interests in land by way of mortgage (section 59), where the interest transferred in any of these modes is substantial interest could have intended to exclude any transfers by act of parties of an interest in immoveable property of Rs. 100 in value, from the necessity of being evidenced by a registered instrument, or could have intended to allow such transfer to be effected by oral agreement or by other than a registered instrument. I have very little doubt that all such transfers *inter vivos* were intended to be included in the one, or other of the transactions coming under the heads of "sale" (Chapter III), "mortgage" (Chapter IV), "lease" (Chapter V), "Exchange" (Chapter VI), and "gifts" (Chapter (VII). Any "transfer" made in the way of creation of trusts is provided for, in the Trusts Act, section 5 of which says, "No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing . . . . . registered." Section 9 of Act IV of 1882 allowing "transfer of property" without writing except where a writing is expressly requir-

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ed by law does not weaken to any appreciable degree the patent conclusion derivable from a study of the Transfer of Property Act as a whole, that the legislature was very anxious that all important transfers of landed property and even *transfers of choses* in action —(S. 130) and *transfers of intangible rights*—(S. 54) should be evidenced by registered instruments so as to prevent litigants from letting in oral evidence as to alleged transfers about the truth or falsehood of which on oral evidence it is almost impossible for courts to come to a satisfactory conclusion in most cases.

So far as transfers of land by conveyance (that is, excluding transfers by mortgages and leases) are concerned I think, that if they are not settlements or declarations of trusts they were intended by the Legislature to come within one of the headings "sale" "exchange" or "gift" in the Transfer of Property Act. "Sale" is defined in section 54 as a transfer of ownership in exchange for a price paid or promised and partly paid and partly promised, etc. The appellants' vakil ingeniously argued that "price" means tangible money in current coin, it may be current notes and does not mean any other valuable consideration. Thus according to this contention if I sell my land to another in satisfaction of Rs. 300 which I owe to him on a pro-note, the transaction is not a "sale" within the definition of the Transfer of Property Act, because I did not receive nor was I promised in future any current coin as "price." Of course in ordinary parlance it is undoubtedly a "sale" and in this very case the appellants in their statements talked of the oral sale of 1893 in consideration of moneys *not paid or promised at the time of sale* but moneys due prior on debts. However, I find in Bouvier's Law Dictionary that the word "price" signifies that, "it consists in money to be paid down or at a future time; for if it be anything else, it will no longer be a price, not the contract of sale but exchange or barter" and Shephard J. in his commentary on the Transfer of Property Act, says: "Price includes money only." The startling result of this technical view is that many so-colled sales of land where the consideration is the satisfaction of old debts due to the vendee as a creditor are not 'sales' at all under the Transfer of Property Act. Pushing the matter further, suppose the purchaser hands over Government promissory note or a cheque on a Government bank, or on the bank in which both parties have invested their money, or currency notes instead of money. Can it be said he does not pay 'price' for his purchase? I do not think that such was the intention of the Legislature by the mere use of the word 'price.' If the price is fixed in the conveyance in current coin, I think, that the words 'price paid' will cover cases where the vendor's

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claim for the receipt of the price is satisfied by giving him what he accepts as tantamount to such payment. For instance, if he says in effect, "Here I owe you three hundred rupees under pro-note and you now owe me three hundred rupees as the price of the land I sell. Why should we go through the farce of your paying me Rs. 300, in current coin for the purchase money and my handing it back to you to repay your promissory note debt? We shall take it that both processes have taken place. I think that in such case we must take it that the 'price' *was* paid and the transaction is a 'sale' though no coins were actually paid by the purchaser. If two persons mutually exchange two things (neither of which is 'money only'), it may be an exchange or barter and not a sale. But if they mutually fix the values of the exchanged thing in current coin and exchange them as of equal value, I think they might be held to effect 'sales' and to pay 'prices' and not merely to effect an exchange or barter.

Even if I am wrong in holding that a conveyance of land in consideration of the moneys already due to the vendee by the vendor does come under the definition of 'sale' in Sec. 54 of Act IV of 1882, I think such transactions ought to be brought under the definition of 'exchange' under Sec. 118 of Act IV of 1882, which makes all the provisions as to the mode of effecting transfers of land by sale applicable to transfers of land by exchanges also. "Exchange" according to the definition in Sec. 118, is a mutual transfer of ownership of two things neither of which is '*money only*.' It seems to me that if a conveyance of land for a debt due by the vendor to the vendee is not a 'sale', it is clearly an 'exchange' as the debtor (vendor) transfers his ownership in land (which is not 'money' and *a fortiori* not money only) while the vendee transfers the ownership in his chose in action (the debt due by the vendor) to the debtor (vendor) (so as to merge and extinguish the debt, the debtor and creditor becoming the same individual by the transfer of the debt to the debtor himself): Here also, the chose in action so transferred, in its turn, is not 'money only.' It is argued that the vendee creditor does not transfer his rights as creditor to the vendor-debtor but only treats the debt as discharged. This seems to me to be merely a play upon words, for the debt is relinquished in *favour of the debtor*, and the substance of the transaction is a transfer of the debt to debtor. In fact, where a testator relinquishes, by his will, a debt in favour of the debtor, it is appropriately styled a gift, by way of legacy of the debt to the debtor, and where a mortgagee relinquishes his mortgage debt he frequently does it by executing a reconveyance of the mortgage interests created under the mortgage deed to the mortgagor.

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If such transfer of land do not come under either the heads 'sale' or 'exchange' the extraordinary result would be that a conveyance of land worth even a lakh of rupees can be legally effected by oral agreement. If the purchaser lends the money a few days before the oral conveyance and relinquishes his debt a few days afterwards as consideration for the oral conveyance, I refuse to believe that such a result could have ever been dreamt by the legislature. I have no doubt that all conveyances of ownership right in lands were intended to be brought under 'sales' or (gifts) or 'exchanges' and that a conveyance for a lakh of rupees due on a pro-note to the vendee was not intended to be excluded from the necessity of having evidence by a registered instrument.

Reliance is placed by the appellants' learned vakil on a case decided by this High Court but not reported in the authorised reports. It is found in *Thiruvengadachariar* v. *Ranganatha Aiyangar*[1] where it was held that when two brothers orally gave their lands to their sister in satisfaction of some claim of hers against them, 'the transaction was not a gift nor a sale nor an exchange under the Transfer of Property Act.' With greatest respect, I am clear in my mind that it was either a sale, or mutual 'exchange' of, two things neither of which was 'money only' and I am therefore not prepared to follow this case. I know where a compromise is not intended to create or effect newly a transfer of title but is only an acknowledgment of existing rights in lands, it is not a sale or exchange *Krishna Tanhaji* v. *Aba Shetty Patil*[2] and need not comply with the provision of S. 54 of Act IV. of 1882 in order to be treated as valid. But neither the present case nor *Thiruvengadachariar* v. *Ranganatha Aiyangar*[1] is such a case of compromise. I therefore overrule the appellants' contention that a registered writing was not necessary to validate the alleged sale of 1892. I might here be permitted to express the wish that the British Indian Legislature would pass an enactment making a registered writing indispensable for the validity of all settlements, partition agreements, and wills and authorities to adopt throughout British India, making very few exceptions in special cases (such as 'soldiers' and 'sailors wills'); so that the flood of intricate and uncertain litigations on such questions might be brought within bounds, and the perjury in connection with wills executed out of the Presidency towns and with partitions and adoptions might be put an end to, to some extent.

The next contention of the appellant's vakil based on the Limitation Act is not sustainable as, if the original mortgagee con-

1. (1903) 13 M. L. J. 500. 2. (1909) I. L. R. 34 B. 139.

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tinued to hold possession as mortgagee owing to the alleged sale of 1893 being invalid and ineffective to convey to him the ownership in the equity of redemption in the A schedule properties, he cannot by merely asserting possession as owner under the invalid sale convert his possession as mortgagee into possession as owner, even granting that the mortgagor knew and acquiesced in his assertion.. The cases *Byari* v. *Puttanna*,[1] *Ramunni* v. *Kerala Varma Valia Raja*,[2] *Bhagvant Govind* v. *Kondi*,[3] *Khiraj Mal* v. *Daim*[4] clearly lay down that article 144 cannot be invoked in favour of the mortgagee if the mortgagor is not barred by Art. 148 from redeeming and recovering possession of the mortgaged property.

The last contention about the admissibility of oral evidence to prove the alleged discharge of the mortgage of 1885 might be disposed of shortly. A mortgage might, even if created by a registered instrument, be proved to have been extinguished by letting in admissible evidence (including oral evidence) of payment of the mortgage amount or by letting in admissible evidence of any other transaction which operates as a mode of payment *Ramawatar* v. *Tulshi Prosad.*[5] It has been similarly held in *Kattika Bapanamma* v. *Kattika Kistnamma*,[6] that while a subsequent oral agreement to modify the terms of a registered maintenance deed cannot be proved, the fact that in particular years, the obligee was in possession of certain lands of the obligor and paid herself the maintenance amount out of the profits of the lands can be proved. (See also *Karampalli Unnikurup* v. *Thekhu Vittil Muthorakutti*[7] and *Subbarow* v. *Venkatanarasimham*[8] Here the defendants do not seek to prove that by the payment of any money or by the receipt by the mortgagee of profits of other lands of the mortgagor, the claim of the mortgagee was paid up and thus the mortgage was extinguished, but they wished to prove an invalid oral conveyance (of which evidence is legally inadmissible) of the equity of redemption in a portion of the mortgaged property as having had the effect of the payment of the mortgage money. Oral evidence to prove a conveyance as equivalent to payment of money has not been allowed in any of the cases cited and could not be allowed. Receipt of mesne profits by possession of lands and receipt of moneys can be proved by oral evidence but not an oral sale of lands worth more than Rs 100 nor can such oral sale be taken as equivalent to the payment of the value of the lands invalidly sold.

In the result the second appeal fails and is dismissed with costs.

1. (1890) I. L R. 14 M. 38.
2. (1891) I. L. R. 15 M. 166
3. (1889) I. L. R. 14 B. 279.
4. (1904) I. L. R. 32 C. 296 (P. C.)
5. (1911) 14 C. L. J. 517.
6. (1906) I. L. R. 30 M. 231.
7. (1902) I. L. R. 26 M. 195.
8. (1902) I. L. R. 27 M. 368.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Kindersley and Mr. Justice Forbes.

Arunachella Chetti ... ... *Appellant** (*Plaintiff.*)

v.

Muthu Chettiar and another ... *Respondents.* (*Defendants*).

C. P. C. 539 (Act XIV of 1882)—Scope of—Suit by a trustee against a trespasser.

S. 539 of Act XIV of 1882 is applicable only in cases of an alleged breach of express or constructive trust created for a public or charitable purpose. The section is applicable only to a suit *against* a trustee and not to a suit by a trustee against a trespasser.

Arunachella Chetti v. Muthu Chettiar.

Second appeal from the decree of the District Court of South Tanjore in A. S. No. 291 of 1879 affirming the decree of the Sub-Court at Kumbakonam in Original Suit No. 21 of 1879.

T. Rama Row for appellant.

A. Ramachandra Aiyar for respondents.

The Court delivered the following judgments.

Kindersley J.—In the present case the plaintiff as the person having hereditary right to the mangement of a public charity, sues a person whom he regards as a trespasser. This is not the case of one of the general public and suing without the authority of the Advocate-General, or other officer to secure the due performance of the trust, and, I think that S. 539 C. P. C. does not apply. The decision of the two Lower Courts must be reversed and the suit must be remanded to the Subordinate Courts for decision on the merits.

The costs will be disposed of by the final decree.

Forbes J.—S. 539 is applicable only in cases of an alleged breach of an express or constructive trust created for a public charitable purpose. The restriction on the right of suing is thus confined to cases where the person sued is a trustee. In the present case, the suit is brought against an alleged trespasser, whose title to manage is denied and who if he is without title, cannot be guilty of a breach of trust.

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*S. A. No. 194 of 1880. 14th July 1880.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusami Aiyar, and Mr. Justice Wilkinson.

Kadambi Srinivasacharlu ... ... *Appellant.**

v.

Durlabha Subuddhi and others ... ... *Respondents.*

C.P.C. XIV of 1882 S. 539—Scope of—Suit by the representatives of founder for preventing abuse of trust—Suit by worshipper in ejectment against trespasser—" Interested "—Meaning of—Limitation Act Articles 44 and 47—Adverse possession.

Srinivasacharlu *v.* Subuddhi.

S. 539 of Act XIV of 1882 does not repeal or affect the right of a private individual to institute a suit to enforce the proper observance of a religious endowment.

The representatives of the founder of a religious endowment are entitled to maintain a suit for the purpose of having abuses in the trust rectified.

Persons of the same sect and form of religious worship as that of the founder of a religious endowment founded for carrying on the sectional religious worship are persons interested in the due performanee of the said sectional religious worship and competent to maintain a suit in ejectment against an intruder.

Possession of the Pujari cannot be adverse to the worshipper.

Article 47 of the Limitation Act (1877) can be no bar to a suit by a person not a party to the order referred to in the article.

Appeal from the decree of the District Court of Ganjam at Berhampore in O. S. No. 20 of 1885.

V. Bashyam Aiyangar for appellant.

R. B. Mitchell for respondents.

The Court delivered the following

Judgment:—The subject matter of this suit is a Mutt in the town of Berhampore and the immoveable properties attached thereto.

The said mutt was founded in the year 1789 by one Kodra Kusannu Subuddhi, a man of the Kodra caste, and of the Chaitanya sect and the idol Brindavana Chandraswami set up therein is worshipped by Uriya people according to the principles of Gowdiya.

The mutt is at present in the possession of the 1st defendant Srinivasacharyulu, a Tamil Brahmin from Mysore and a follower of the principles of Ramanuja. He has been in possession since 1873 when he obtained from 2nd defendant Balabhadra Doss, the then Pujari or Adhikari or Archaka of the mutt, a deed of sale conveying all his (Balabhadra's) rights to 1st Defendant.

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*A. No. 10 of 1887. 28th August 1888.

The plaintiffs claim to be entitled to eject 1st Defendant and to obtain possession of the mutt and its properties in order that they may appoint a proper Adhikari and Pujari to manage the affairs and conduct the worship of the mutt according to Gowdiya principle. They base their claim on three grounds (1) on their being the heirs or representatives of the founder of the mutt (2) on their having always exercised the power of appointing the Adhikari, and (3) on their being worshippers in the mutt. They impeach the alleged sale by 2nd Defendant to 1st Defendant as fraudulent and invalid, and state that 1st Defendant is totally unfit to be the Pujari or Archaka of the mutt.

The 1st Defendant relied on his purchase from 2nd Defendant, denied that plaintiffs had ever been Dharmakartas or managers of the mutt, and asserted that he was according to Hindu Law perfectly competent to hold the office of Pujari, but offered, if the court thought otherwise, to appoint a person to officiate as such.

The 2nd defendant sided with the plaintiffs.

The District Judge found that the plaintiffs are the descendants of Kusannu Subuddhi the founder of the mutt but held that there was no reliable evidence to show that the family of the founder ever took any active part in the management of the institution, or in the appointment of the Pujari, which office had descended from Guru to Chela without interference on their part until 1868, that at the instigation of the plaintiffs the newly appointed temple committee then called 2nd Defendant who was in charge to account, and on his refusing to give an account dismissed him, that thereupon 2nd defendant in January 1871 attorned to the plaintiffs and executed a deed of submission (Exhibit N); that in May of the same year the actual Adhikari or Archaka Nandi Keswara Doss returned from Nowgada and resigned his post to his chela 2nd Defendant, that thereupon 2nd Defendant executed or purported to execute a deed of sale in favour of 1st defendant conveying to him the mutt and its properties. The Judge held that this sale was invalid and that 1st defendant was unfit to hold the post of Archaka or Pujari of the mutt and was incompetent to appoint an archaka on the ground that plaintiffs have a general interest in the institution as members of the Chaitanya sect as well as a special interest as descendants of the founder. The Judge therefore directed them with the assistance of the Guru of the principal Chaitanya mutt at Puri to nominate a duly qualified Bairagi and accepting their nominee (who has been made 6th Respondent) ordered the 1st defendant to make over the mutt and its properties to him.

Srinivasa-charlu v. Subuddhi.

The 1st defendant appeals.

The first ground of appeal is that the plaintiffs having failed to establish the title upon which the suit was based, the court was bound, without going into the appellant's title, to have dismissed the suit. Admittedly the suit was not one brought under the provisions of S. 539 of the Civil Procedure Code. The plaintiffs did obtain the necessary permission (Exhibits J. & K.) to bring a suit under that section, but appear to have subsequently changed their mind. It is not contended, nor could it, we think, be successfully contended, that S. 539 repeals or affects the right of a private individual to institute a suit to enforce the proper observance of a religious endowment. But it is argued that the District Judge having found that plaintiffs have no direct interest in the trust, the decree which to all interests and purposes is such a decree as might have been passed had the suit been brought under S. 539, is bad. The argument might be valid if the decree could not be supported on other grounds. The suit was not brought under S. 539 and the decree therefore was not passed under that section.

It is next urged that the suit has not, with reference to the provisions of S. 30 of Civil Procedure Code been instituted on behalf of all the worshippers of the Mutt. That is conceded. It is then pointed out that in 1876 plaintiffs 1—3 and others applied to the District Court (Exhibit L) for permission to institute a suit under Act XX of 1863 against the present defendants and that sanction was refused. The suit therefore not having been brought under any of the above enactments, but as a mere suit in ejectment on title, and title having been negatived, the suit must it is argued, fail. Respondents' counsel argues that plaintiffs as beneficiaries of the Mutt which is a public institution, are entitled to maintain the suit, even if this court should refuse to uphold their right as trustees (see memorandum of objections). The first question therefore for determination is whether the suit is maintainable.

The finding of the judge that plaintiffs have failed to establish their right to, or their exercise of the right to manage the affairs of the Mutt and to appoint the Archaka is in accordance with the evidence. But as pointed above the plaintiffs base their claim to succeed on three different grounds. They first set forth their right to interfere as being the heirs and representatives of the original founder of the Mutt. It has been found that they are so and no objection has been taken to the finding. It has been held by the Calcutta High Court in *Brojomohun Doss* v. *Hurrolok Doss*[1] that the repre-

1. (1880) I. L. R. 5 C. 700.

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sentatives of the person who endowed the property are the persons who are entitled to institute proceedings for the purpose of having abuses in the trust rectified. We are therefore of opinion that the judge rightly held that as representatives of the founder plaintiffs were entitled to maintain the suit. Another and third ground on which plaintiffs based their claim was that they were worshippers in the Mutt. It was held by this court in *Fakurdin Sahib* v. *Ackeni Sahib* [1] that apart from any pecuniary interest they might have in the income of the institution, the plaintiffs as resident Mahammadans (the suit was for the removal of defendants from the management of a Durga) were sufficiently interested therein to entitle them to maintain the suit. No doubt as mere worshippers the plaintiffs would not be entitled to possession but the object of the suit is not actual possession but the appointment of a proper archaka and the management of the institution according to Gowdiya principles. The plaintiffs in their plaint pray "for such other relief as the court may think proper having regard to the facts of the case in order to carry out the wishes of the founder". Now what are the undisputed facts of the case? The Mutt was founded by a Member of the Chaitanya sect and the idol consecrated therein is one worshipped by Urya people according to Gowdiya principles. After the institution had been managed for 84 years in accordance with the intention of the founder, a foreigner, a man of a different sect and religious presuasion, who is unable to perform religious services for the Chaitanya sect suddenly through the illegal act of the Archaka for the time being, obtains possession. As persons interested in the due performance of religious worship by a duly qualified person, the plaintiffs come forward and ask for the ejectment of the intruder. They have made out that part of the case and in our judgment were entitled to maintain the suit and the judge was justified in passing the decree he did.

In the second place it is urged that the suit is barred by limitation. If it is said, plaintiffs are, as they represent trustees, the possession of 2nd defendant under whom 1st defendant claims became hostile to plaintiffs on the 16th May 1871 and the suit is out of time. If, it is further argued, plaintiffs are not trustees the suit is barred by article 47 Schedule II of the Limitation Act.

In our judgment the plaintiffs' suit is not barred either by adverse possession or by article 47. The mutt being one founded for the benefit of the Chaitanya sect, the possession or enjoyment of the Pujari for the time being cannot become adverse to the worshipper

1. (1880) I. L. R. 2 M. 197.

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The renunciation by Nandikeswar Doss on 16th May 1871, of his office as Pujari in favor of his Chela, 2nd Defendant created in 2nd Defendant no title or possession adverse to the worshippers of Brindavanachandraswami. The deed of relinquishment (Exhibit XVII) itself recognises the fact that the endowment was given, not for the benefit of the manager for the time being, but for the use of the Mutt. Accepting the principle laid down in *Kannan* v. *Nilakanta*[1] to which we have been referred, although the facts are not on all fours with the present case, the plaintiff's suit is not barred by Article 144 Schedule II of the Limitation Act because the suit was brought within 12 years from the date of the sale deed by 2nd defendant to 1st defendant, and from that time alone was possession adverse to a worshipper of the Chaitanya sect or the representative of the founder.

Article 47 also is not a bar. Subsequent to the alleged sale by the 2nd defendant, he during the absence of the 1st defendant re-entered and took forcible possession of the Mutt. He was prosecuted, found guilty of house-breaking and etc., and sentenced to imprisonment in January 1874. On the 6th February 1874 the Magistrate who tried the case ordered possession to be given to 1st defendant. The order was passed under S. 534 Act X of 1872 (corresponding to S. 522 of the present Code). The plaintiffs were no parties to the Criminal Proceedings which terminated in the said order, nor can it be said that they claim under the 2nd defendant so that Article 47 has no application.

The appeal fails and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Mura Kasim Rowther and others. *Appellants* * (Defendants).

v.

G. F. F. Foul Kes by his Agent E. S. B. Stevenson. *Respondent* (Plaintiff).

Madras Estates Land Act, S, 11, 151—Contract or usage to use holding for unagricultural purposes—Enforceability,

In Madras Act I of 1908 a contract between a landlord and tenant or a usage which would entitle the tenant to use the holding in a manner which might impair the value of the land for agricultural purposes is not made inoperative

1. (1884) I. L. R. 7 M. 337.

*S. A. No. 1440 of 1911. 24th July 1912.

Mura Kasim Rowther v. G. F. F. Koul Kes.

Section 151 or section 11 has not effect of making a contract or custom to the effect that the tenant may use the holding for a tannery unenforceable against the landholder.

Second appeal from the decree of the District Court of Salem in A. S. No. 200 of 1909 preferred against the decree of the Court of Head Quarters Deputy Collector, Salem, in summary suit No. 12 of 1908.

A. Ramachandra Aiyar for appellant.

T. Rangachariar for respondent.

The Court delivered the following

Judgment:—The plaintiff in the suit is a mittahdar in the Salem District. The defendants are ryots holding certain lands under the plaintiff. The object of the suit is to eject the defendants. The right to eject is based in the plaint on the ground that the defendants built a house for the purpose of having skin godown on a portion of the holding which according to the plaintiff the defendants had no right to do. The plaint alleges that "the act was liable to cause damage to the relationship of landlord and tenant prevailing between the two parties and to the rights and relief which the plaintiff has under the Madras Estates Land Act." (Paragraph 11 of the plaint). In the written statement the defendants pleaded that the ryots, from time immemorial, had been claiming the right to build skin godowns, indigo godowns, bangalows and etc., to live in and let out on the lands in respect of which assessment was collected in Salem Mitta and that the plaintiff—Mittahdar and his predecessors had accepted such right. The Deputy Collector dismissed the suit. On appeal the District Judge has held that the defendants' act in constructing a skin godown or tannery was improper and he granted an injunction against the defendants directing him to dismantle the tannery and to discontinue tanning in the field. The defendants relied upon a custom in the Mitta, according to which ryots holding agricultural land were entitled to erect skin godowns and tanneries and relied on the judgment in a previous suit by the mittahdar against another ryot in O. S. No 385 of 1904. In that case it appears that a custom of the sort pleaded by the tenant was upheld by the courts. The District Judge observes, with respect to the judgment in that suit that the fact that the specific question whether the tannery would render the land unfit for agriculture was not raised would not render the judgment inadmissible in evidence or deprive it of all weight, as the effect of the custom would be to render the defendant's act proper even if the tannery rendered the land on which it was erected unfit for agriculture. The effect of the defendant's plea

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in fact is to make it a part of the contract between the parties that a skin godown or tannery might be created by the parties although no express provision to that effect be made in the contract between the parties. With respect to Act I of 1908 we are unable to find any provision in it which would render such a contract or custom invalid. S. 157 enacts that " A land holder may institute a suit before the Collector to eject an occupancy right from the holding, only on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes." Reading it with Clause (g) of Section 187, which lays down that " nothing in any contract between a landholder and a ryot made before or after the passing of the Act, shall entitle a land-holder to eject a ryot otherwise than in accordance with the provisions of this Act" and also along with S. 9 which provides that, no landlord shall, as such, be entitled to eject a ryot from his holding or any part thereof otherwise than in accordance with the provisions of this Act," S. 151 appears only to restrict the right of the landholder to eject the ryot by limiting it to a case where a ryot has materially impaired the value of the holding for agricultural purposes.

S. 11 has been relied by the learned vakil for the respondent. It states that " a ryot may use the land in his holding in any manner which does not materially impair the value of the land or render it unfit for agricultural purposes. But this section does not deprive him of the benefit of a contract or usage which would entitle him to use it in a manner which might impair the value of the land for agricultural purposes. It would, no doubt, probably have the effect, in case of relinquishment of the land by him, of depriving the landlord of the benefit of letting it out again for agricultural purposes. There is, however, nothing in the Act which renders such a contract or custom unenforceable against the landholder.

The District Judge has not considered the evidence of custom as a whole before recording a finding on the question. The respondent contends that there was no definite issue on the question of custom, although the defendant's right to erect a skin godown or tannery was generally put in issue. It is, we think, desirable that a specific issue should be raised on the question and decided. It will be necessary to find the limits of any customary right which the ryot may possess to erect a tannery. The appellants' pleader is hardly prepared to go the length of contending that the whole of a holding could be used for such a purpose.

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We shall therefore reverse the decrees of both courts and remand the suit to the court of first instance for fresh disposal after framing a specific issue on the questions whether the defendant was justified by any legal and valid custom in erecting a skin godown or tannery and what are the exact incidents of such custom.

Both parties will be entitled to adduce fresh evidence. All costs up to date will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Sundra Aiyar and Mr. Justice Sadasiva Aiyar.

Sudalai Ammal ... ... *Plaintiff. Appellant.**

v

Minor Gomathi Ammal by her guardian Lakshmana Mudaliar ... } *1st Defendant. Respondent.*

Sudalai Ammal v. Gomathi Ammal.

Hindu Law—Widows—Co-widows—Right to partition putting an end to right of survivorship—Right of suit—Family settlement—Beneficiary. Third party—Right of Suit—Deed—Partition—Construction.

Two Hindu co-widows may make a partition of their husband's estate so as to deprive either of them of the right to succeed by survivorship to the property allotted to the other.

A third party in whose favour a provision is made in a family settlement in the nature of a partition can claim the benefit of the provision made in her favour.

Held on the construction of the deed of partition between two Hindu co-widows in the case that one of the widows and her daughter took some properties allotted to them as against the right of survivorship of the other widow.

Second appeal from the decree of the District Court of Tinnevelly in Appeal Suit No. 405 of 1909 presented against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 34 of 1908.

S. Ramaswami Aiyar for appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for respondent.

The Court delivered the following

Judgment:—The suit out of which the second appeal arises was instituted by one of the widows left by a Hindu Nellakannu Konar for possession of the properties which were in the enjoyment of her co-widow the title alleged being that she became entitled to succeed to the property as survivor on the death of her co-widow. The two widows after the death of their husband effected a partition which is evidenced by Ex. A.

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* S. A. No. 830 of 1911. 9th August 1912.

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The most important question in this case is whether according to the terms of Ex. A, the plaintiff was entitled to possession on the death of Shanmugathammal her co widow. The two lower Courts have put different constructions upon the document. Its interpretation is not free from difficulty. But after careful consideration of its terms we have come to the conclusion that the construction put by the District Judge, which is against the plaintiff, is correct. The parties to the agreement were the plaintiff and her co-widow, but there can be no doubt that the daughter of Shanmugathammal named Gomathi was an important object of consideration at the time of the arrangement. There had been disagreement between the widows and according to the document mediators were called in to settle the disputes, and the contract embodies the arrangement which was entered into as the result of the mediation. It states "Sudalai Ammal (that is the plaintiff) among us should enjoy until her life-time, the immoveable properties mentioned in Schedule I hereof which belong to the family, with the Government *tirvai* etc., that Shanmugathammal and the child Gomathi among us should enjoy the immoveable properties mentioned in Schedule II hereof with the Government *tirvai* etc., in the same manner." Although Gomathi is not a party to the agreement this clause expressly provides that Shanmugathammal and Gomathi should enjoy the immoveable properties in Schedule II hereof.

Now what was the object of introducing this provision about Gomathi. Two contentions have been urged by the plaintiff's vakil as accounting for it. One is, that Gomathi's name was put in, merely because she would, as a matter of fact have the benefit of property allotted to Shanmugathammal as her daughter. In other words no specific legal effect was intended to be given to the mention of her name.

The other contention is, that the object was to indicate that Gomathi was not to have any claim on account of her maintenance or the expenses of her marriage as against Sudalai Ammal. This is of course, possible but in that case it is noteworthy that the clause restricting her right is not confined in terms "during the life time of Shanmugathammal." There is also the observation to be made that such a provision against the interest of Gomathi who was not a party to the document would be ineffectual as against her. Still it is possible that the two ladies put it in, in order that Shanmugathammal should be liable for Gomathi's maintenance as between themselves that if the object was to restrict Gomathi's right it is not likely that the

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clause would be put in the form it bears. The clause is not restrictive in its terms, but purports to give her a right namely, the right of enjoyment of the properties in schedule II. There is another important clause added after the schedule. It is in these terms: "We both should enjoy respectively the properties mentioned in Schedules I and II aforesaid during our life time, without subjecting them to any encumbrances and after our death, our heir Gomathi, the daughter of Shanmugathammal among us should enjoy with absolute rights."

There is clear intention manifested by this clause to confer a benefit on Gomathi, because it provides that Gomathi was to have the properties allotted to the two widows absolutely after their death. This was no doubt clearly more than what the widows could effect by any arrangement between themselves. But none the less it shows their intention that Gomathi should derive the benefit provided under this instrument. We have perused the clause in the original document and we are of opinion that it should be construed to mean that after the life-time of each widow, Gomathi should take her property absolutely. The clause is certainly to be understood distributively with respect to the enjoyment by the two widows as shown by the word "respectively." And it appears to us that with regard to succession also it was intended to operate distributively. Thus construed, Gomathi must be taken to be spoken of as the heir of each of the widows.

On this construction this clause would lend strong support to the interpretation placed by the District Judge on the former clause that both Shanmugathammal and Gomathi should enjoy the properties in Schedule II.

Another object perhaps, of the last clause was to make it clear that the widows were not to alienate or encumber the immoveable properties allotted to each. They were empowered to alienate some moveable properties by an earlier clause.

This power of alienation was not to extend to the immoveable properties which Gomathi was to take on the death of each widow with absolute powers of alienation. Reliance was placed on one of the clauses supporting a contrary construction. The document provides that each of the two ladies should pay one Irulammai the sister of the deceased father-in-law two *kottas* of paddy during her life-time. It was argued that if Gomathi was intended to have the right to en-ay the properties in Schedule II a provision would have been inserted that if she owned the property exclusively on the death

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of Shanmugathammal, she would also be bound to pay the maintenance due to Irulammai. This argument is entitled to some weight. But it may be, that it was assumed that as Shanmugathammal was stated to be bound to pay part of the maintenance the same obligation would continue to rest on Gomathi if she survived her. At any rate we do not think that the argument derived from this clause is sufficient to outweigh the considerations we have already mentioned. On the whole we are of opinion that both Shanmugathammal and Gomathi were entitled to the property in Schedule II and that the plaintiff did not become entitled to them on the death of Shanmugathammal.

It was urged that Gomathi being no party to this document she cannot claim any benefit under it. The agreement of partition was in the nature of a family settlement. Gomathi was the daughter of one of the two widows. In such a case we are of opinion that Gomathi would be entitled to claim the benefit of the provision made in her favour. This is in accordance with the view held by this court in several cases. See *Ramakkal* v. *Ramasami Naiken.*[1]

The next question argued for the appellant is that supposing that Sudalai Ammal intended by Exhibit A to give up her life interest during the whole of her life-time even though Shanmugathammal might die before her such an agreement is invalid because the co-widows of a Hindu could not make a partition which would deprive either of them of the right to succeed by survivorship to the property allotted to the other. No principle of Hindu Law is cited in support of this contention. It is admitted that the decision *Gomathiammal* v. *Kuppathai Ammal*[2] is against this contention. *Ramakkal* v. *Ramasami Naiken and another*[1] is also against it, though an attempt was made to distinguish it on the ground that the partition in that case was held to be effective not as against the heirs of the deceased widow, but as against her alienees. And it was argued that the case was really rested on the ground of estoppel. The decision does not however proceed on the ground of estoppel. Reliance was placed on the observations of the Judicial Committee of Privy Council in *Bhagwandee Doobey* v. *Myna Baye*[3]. In that case their Lordships were dealing with the effect of partition made by order of Court and not with the result of a contract entered into between the widows. According to the Mitakshara Law, the widows of a Hindu take a joint interest in his estate with rights of survivorship. If they effect a partition the presumption would be

1. (1899) I. L. R. 22 M. 522. 2. (1904) 14 M. L. J. 175.
3. (1867) 11 M. I. A. 427 at pp. 514 & 515.

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that each widow gave up her right of enjoyment of the properties allotted to the other widow during the life-time of the latter; and a court will not enforce against the will of one widow any right to partition, except the right of enjoyment during the life-time of each of the widows to whom properties are allotted. This is the principle underlying *Chittar Kunwar* v. *Gaura Kunwar*,[1] and *H. H. M. Jayamba Bayi Saiba* and *another* v. *H. H. M. Kamakshi Bayi Saiba and others*, and *H. H. Bayi Saiba and another* v. *H. H. M. Jayayamba Bayi Saiba* and *another*[2] and *Deenamoni* v. *Elahadhut Khan.*[3] But this does not show that a widow may not give up her interest during whole of her own life-time and not merely during the life-time of the other widow to whom the property may be allotted. Such an agreement would be supported by consideration *viz.*, the right to enjoy some of the properties during her own life-time. The Privy Council in *Bhugwandee Doobey* v. *Myna Baye*[4] carefully avoided expressing any opinion on this question. Both the Madras cases referred to above are direct authorities for the position that she may do so; and on principle it is difficult to say why she should not. It is not denied that a widow may part with her life interest in favour of a stranger. Why should she not deal with it in an agreement of partition between her and her co-widows? In *Durga Dutt and others* v. *Gita* and *others*[5] this question did not arise for decision. The question there was whether a donee from a widow could enforce a partition against her co-widows and it was held that she could. There is no doubt an observation at page 446 which might be construed to be in plaintiff's favour. But we cannot take it as a deliberate opinion upon a question which was not before the learned Judges who decided the case. In *Ramakkal* v. *Ramaswami Naiken* and *another*[6] this Court followed the view adopted by the Calcutta High Court in *Kailash Chander Chakerbuty* and *others* v *Kashi Chandra Chakerbuty* and *another.*[7] We are of opinion that this contention is not entitled to succeed, notwithstanding the able and strenuous argument of Mr. Ramachandra Aiyar, Vakil for the appellant.

We dismiss the second appeal with costs.

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1. (1911) I. L. R. 34 A. 189. 2. (1868) 3 M. H. C. R. 424.
3. (1904) 8 C. W. N. 843. 4. (1867) 11 M. I. A. 487 at pp. 514 & 515.
5. (1911) I. L. R. 33 A. 443. 6. (1899) I. L. R. 22 M. 522.
7. (1897) I. L. R. 24 C. 339.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Presant :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Umman Khan ... ... *Appellant.**

v.

Nagalla Dasanna and others ... ... *Respondents.*

Limitation—Adverse possession—Mortgagor and mortgagee—Possession on agreement between parties that mortgagee is to hold possession as owner.

Umman Khan v. Nagalla Dasanna.

It is open to both parties to a mortgage deed, the mortgagor and the mortgagee, to agree at any time that the mortgagee shall be in possession of the mortgaged property as owner thereof ; and possession so held by the motgagee for over twelve years will extinguish the mortgagor's title to redeem.

Second appeal from the decree of the District Court of Cuddappah in A. S. No. 219 of 1910 preferred against the decree of the Court of the District Munsif of Prodattur in O. S. No. 787 of 1908.

T. V. Seshagiri Aiyar, and *S. Gopalaswami Aiyangar*, for appellant.

V. Ramesam for respondents.

The Court delivered the following

Judgment :—This is a suit for redemption. The 3rd defendant's father obtained a mortgage from the 1st defendant's husband in the year 1876. According to the terms of that mortgage the amount of the debt was to be paid at the expiration of 8 years. Then it goes on to say " in case if the interest on the said principal accruing every year or the principal not being paid, you shall immediately on the expiry of the stipulated period of 8 years take possession of the said land etc., and shall happily enjoy the same in succession from son to grandson and as long as the sun and moon last." The mortgagee was not entitled to possession immediately according to the terms of the document, but he was to take possession of the property as owner after the time fixed for payment elapsed. On the 2nd July 1885 the 1st defendant's husband sent a petition Exhibit II to the Tahsildar in order that patta for the land might be transferred to the 3rd defendant's father. The petition stated "I have put Nagalla Vobalakandu in possession for Rs. 1,475/- being principal and interest due by me according to the document executed and registered on 26th August 1876. ** Therefore please remove my name." If Exhibit A is a redeemable mortgage

*S. A. No. 282 of 1911. 2nd September 1912.

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then apparently Exhibit II taken by itself, it might be argued, would not affect the plaintiff's right to redeem but Exhibit I throws further light on what led to the petition Exhibit II. Exhibit I is a receipt for a sum of Rs. 250 paid on the date of the document, 20th November 1885. It contains this recital—" As owing to my inability to pay to you the money due under the deed of mortgage, I have on 2nd July 1885 relinquished the lands and for patta being issued to you &c.. " It then acknowledges payment of a sum of Rs. 250 which is stated to be paid out of grace to the executant of the receipt. The language of the recital in our opinion is conclusive that at the time when Exhibit II was put in there was relinquishment of all right to the property by 1st defendant's husband. That relinquishment we shall assume for the decision of the case to be invalid to extinguish the right of redemption. But it shows that 3rd defendant's father was to hold possession from its date as owner with full rights to the property. Admittedly the 3rd defendant has been in possession of the property ever since, *i.e.*, for a period much longer than 12 years. The question is whether that possession has made him the absolute owner of the property by prescription. The argument for the appellant is that his possession must be taken to have been under the rights possessed by him under Exhibit A. as mortgagee and it is strenuously argued by Mr. Seshagiri Aiyar the learned Vakil for the appellants that a mortgagee who is entitled to take possession under the mortgage cannot be permitted to acquire any higher right by virtue of his possession. It is no doubt true that the 3rd defendant was entitled to take possession under Exhibit A and we shall assume that possession so taken would be held by him as mortgagee. But assuming all this what was there to prevent both the mortgagor and the mortgagee from agreeing that the mortgagee should from a certain date hold possession as owner? Such an agreement may not be valid to confer immediate title on the mortgagee but as far as we are aware there is no principle of law which prevents both parties from agreeing what the character of the possession to be held by the mortgagee should be from a certain date. It is quite true that a mortgagee cannot by a mere assertion of his own or by any unilateral act of his convert his possession as mortgagee into possession as absolute owner. That is a principle in favour of the mortgagor which prevents the mortgagee from altering the legal character of his possession by his own act or assertion. That has been laid down in several cases, one of the earliest of which is *Ali Muhammad* v. *Lalta Baket.*[1] But they have no bearing on

1. (1878) I. L.R. 1 A. 655.

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the question of the effect of an agreement between both parties that the mortgagee should hold possession as owner and not as mortgagee.

The cases cited by Mr. Seshagiri Iyer do not establish the position taken up by him. *Kurri Veera Reddi* v. *Kurri Bopi Reddi*[1] merely laid down that where there is an ineffectual sale the vendee cannot set up that he has acquired any title by estoppel. It did not deal with the result of possession in him for more than the statutory period. To allow the defendant to set up a title by estoppel in such a case would be virtually allowing to escape the provision of the Transfer of Property Act which requires a registered conveyance to effect a sale. In the Privy Council case of *Sri Raja Bapamma Row* v. *Sri Veera Pratapa Ramachandra Raju*[2] their Lordships held that possession was given to the mortgagee in his character as mortgagee. In that view he was of course liable to be redeemed. In *Dasharatha* v. *Nyahal Chand*[3] the Court held that possession was obtained and held by the defendant as mortgagee. The character of the possession must of course determine what right would be acquired by virtue of possession. In *Byari* v. *Puttanna*[4] the ineffectual conveyance was executed by one of the members of an Aliyasantana tarwad with the consent of two others. Such consent of course could not be binding on the tarwad. The person who executed the conveyance and those who consented to it had no severable interest in the tarwad property. The result therefore was that the former character of the possession which began previously to the conveyance was not altered by the conveyance or by the consent of some members only of the tarwad which could not operate as against the tarwad as a whole. We are of opinion that both parties were entitled to agree in what character the 3rd defendant could hold possession, and that the plaintiff who purchased the equity of redemption from the 1st defendant cannot now claim to redeem on the footing that the 3rd defendant's possession has throughout been as mortgagee.

We dismiss the second appeal with costs.

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1. (1904) I. L. R. 29 M. 336.
2. (1896) I. L. R. 19 M. 249.
3. (1891) I. L. R. 16 B. 134.
4. (1890) I. L. R. 14 M. 38.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Kattamoody Raghupathy ... *Appellant. (Plaintiff).**

v.

Kattamoody Kannamma and others ... ... *Respondents. (Legal Representative of the 1st Defendant and Defendants 2 to 4)*

Hindu Law—Widow—Alienation with consent of reversioner for consideration or no consideration—Partial and total alienation—Future and past alienation—Consent and ratification—Relinquishment by reversioner—Alienation by widow.

A reversioner may be estopped by his consent, given for consideration from contesting a Hindu widow's future alienations. *Rangappa Naik v. Kamti Naik*[1] followed

Raghupathy *v.* Kannamma.

Held.—Per *Sundara Aiyar* J, that the reversioner in the case was estopped from contesting a gift by a widow to her adopted son, whose adoption was found invalid in a prior litigation by the reversioner, by reason of a relinquishment deed he executed to the widow prior to the date of the gift in which he gave the widow power to dispose of the property by means of gift or sale; and that it did not matter that the term of the deed of relinquishment itself did not show that any alienations were contemplated.

Per *Sadasiva Aiyar* J. (*Sundara Aiyar* J. inclining to the same view.) There is no distinction in the applicability of the rule of estoppel to a reversioner in respect of alienations by a Hindu widow made with his consent with reference to alienations for consideration and alienations for no consideration *Kuppier alias Venkatasubbier v. Kotta Chinnasami Iyer*[2] followed.

2. Per *Sadasiva Aiyar* J:—Nor is there any warrant for any distinction between alienation of part and alienation of the whole estate: *Rangappa Naik v. Kamti Naik*[1] *Wallis* J's dictum approved.

3. Consent to future alienations stands on the same footing as ratification of past alienations.

4. There is no distinction between an alienation by the widow to third person with the reversioner's consent and a relinquishment by the reversioner to the widow herself thereby conferring on her an absolute estate.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Guntur dated 2nd September 1910 in A. S. No. 189 of 1907 preferred against the decree of the Court of the District Munsif at Ongole in O. S. No. 271 of 1906.

K. Narayana Rao for appellant.

P. Nagabushanam for respondents.

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*S. A. No. 507 of 1911. 26th August 1912.

1. (1907) I. L. R. 31 M. 366. 2. (1912) M. W. N. 758.

Raghupathy v. Kannamma.

Sundara Aiyar J.

The Court delivered the following.

Judgment—*Sundara Aiyar* J.—The subject matter of this suit is a house. One Venkatarayudu left a widow Seethamma. She adopted one Madhavarayudu, the 1st defendant in this suit. Venkatarayudu's reversioner according to Hindu Law was the plaintiff. He instituted a suit to set aside the adoption of Madhavarayudu. That suit succeeded. After the termination of the suit two documents came into existence. One of them is Ex. D. and the other is Ex. E. Ex. D. was executed by the plaintiff in favour of the widow. According to that document he received Rs. 400/—from the widow; and then the documents state "I have relinquished my reversionary right and claim in the said property (i. e. the property of Venkatarayudu.) Therefore you shall enjoy the said property with power to dispose of the same by means of gift or sale; but neither I nor my heirs shall have anything whatever to do therewith." This document was executed on the 1st May 1896. On the 19th of the same month the widow Seethamma executed a deed of settlement in favour of the 1st defendant Madhavarayudu, whereby she settled on him certain cultivated land and the house in question in this suit. There was subsequent litigation between the parties. The plaintiff had executed mortgages in 1892 of his right in Venkatarayudu's property which was then only a reversionary interest. The mortgagee obtained decrees and purchased the properties mortgaged which however did not include the house in dispute. He also attached the house as property belonging to the plaintiff whose right had then ripened into an interest in possession, the widow having died previously. The question arose, whether the relinquishment deed Ex. D. would vest the property relinquished by the plaintiff in the widow, so as to make it impossible for the creditor to attach it as the plaintiff's property after the widow's death. This Court in second appeal held that as regards the creditor the right to the property was in the reversioner, notwithstanding the relinquishment deed. See *Narasimham* v. *Madhavarayudu*[1]. In that judgment any question between the reversioner and the transferee from the widow, that is Madhavarayudu, was reserved. The learned Judges observed. "No question arises in this case as between the reversioner who purported to make a transfer and the transferee." The plaintiff in that suit was the transferee and the 1st defendant there was the creditor. The 2nd defendant was the plaintiff. Any question between the plaintiff and the 2nd defendant there was expressly left undisposed of. That is the question which now arises for decision.

1. (1903) 13 M. L. J. 323.

Raghupathy v. Kannamma.

Sundara Aiyar J.

Shortly put, the question is whether the plaintiff is estopped by reason of Ex. D from disputing the alienation in favour of the defendant Madhavarayudu made by the widow. The District Munsiff held he was not: the District Judge held that he was. Now it is settled law that, if a reversioner for consideration assents to an alienation made by a widow or ratifies it subsequently, he would be estopped from disputing the alienation. In this case it is quite clear that there was no specific assent to this particular alienation. The question is, was there an assent in such shape as would furnish the 1st defendant with a plea of estoppel. It is to my mind quite clear that if a reversioner for consideration gives general consent to a widow to alienate and says that she might make any alienation that she pleases, it would estop him with respect to any alienation made by her. The language here in Ex. D. does not specifically refer to any alienations contemplated by the widow. The provision is " therefore you shall enjoy the said property with power to dispose of the same by means of gift or sale." In other words the absolute estate with power of alienation was to vest in the widow. They themselves cannot be said to refer to any contemplated alienation at all, but only describe the estate which was to vest in the widow. But in the circumstances of this case I can entertain no doubt that the object of the deed of relinquishment and of the settlement was to enable the widow to deal with the property in favour of the defendant whose adoption made by her, had not been upheld by the Courts. It is quite true, as stated by Mr. Narayana Rao that in the lower Courts it was not contended that Ex. D. & E. were parts of the same transaction and that Ex. D. was executed with a view to enable the widow to settle her property on the defendant. But it is impossible for me to entertain any doubt that it must have been so. The circumstances put it beyond any doubt. It is doubtful whether it would not be sufficient, for purposes of estoppel, for a reversioner to empower the widow to enjoy the property as her absolute property with powers of alienation. I am by no means clear that it should not be held that in such a case he practically gives consent to any alienation that she may make, although the terms of the document may not show that any alienations are actually contemplated. I do not, however, rest my judgment on this ground and I would prefer to reserve to myself the right to consider that question again when it should arise for decision. I rest my judgment on the ground that Ex. D. must have been executed with a view to enable the widow to make provision for Madhavarayudu and that the plaintiff did assent to any alienation which the widow might make in his favour. In the Full Bench case *Rangappa Naik*

Raghupathy v. Kannamma.

Sundara Aiyar J.

v. *Kamti Naik*[1] the assent by the reversioner was to any alienations that the widow might make and not to the particular alienation which was contemplated. All the learned Judges who took part in that judgment were of opinion that for purposes of estoppel that was sufficient. I think the principle of that case applies and the plaintiff must be held to be estopped.

I should refer to an argument of the learned Vakil for the appellant, that it should not be assumed in this case that the plaintiff received consideration for executing the relinquishment. The document says he did receive it; a note made by the Sub-Registrar shows that it was paid before him. Plaintiff no doubt denied it in his plaint. An issue was framed on the question but plaintiff did not adduce any evidence to support his allegation. It does not appear that the parties had not an opportunity of adducing any oral evidence that they might choose. The Munsif says that the matters in dispute were put so clearly in the course of previous litigations that neither party adduced oral evidence. I am not able to say that any thing said or done by the District Munsif, induced the plaintiff to abstain from adducing any evidence that he could. I must therefore proceed on the footing that he did receive consideration. The Munsif, in fact, says in his judgment that he did receive it and no objection has been raised in the memo of second Appeal to the assumption that the plaintiff did receive the sum of Rs. 400- in consideration of executing Exhibit D.

I am, therefore, of opinion that the second appeal must be dismissed with costs.

Sadasiva Aiyar J.—In this second appeal I am inclined to base my judgment on the conclusion that I have arrived at purely on the questions of law which have been argued before us. The law as to the validity of alienations made by a widow of property which she inherits from her husband with the consent of the reversioners has given rise to much difference of judicial opinion for a long time past. In *Rangappa Naik* v. *Kamti Naik*[1] the learned Chief Justice says at page 371 that there may be a difficulty in reconciling the statement of the law by the Privy Council in several earlier cases with their statement of the law in *Bajrangi Singh v. Manokarnika Baksh Singh* [2] But as he says we are bound by the last pronouncement of the Privy Council upon this question. Now after having considered that last pronouncement of the Privy Council and having considered also the decisions in *Rangappa Naik* v. *Kamti Naik*[1]

1. (1907) I. L. R. 31 M. 366, 2. (1907) I. L. R. 30 A. 1.

Raghupathy v. Kannamma.

Sadasiva Aiyar J.

and *Kuppier alias Venkatasubbier* v. *Kotta Chinnasami Iyer*[1] I have come to the following clear conclusions on the questions of law which have been argued in this case. I agree with the learned Judges who decided the case *Kuppier* alias *Venkatasubbier* v. *Kota Chinnaswmi Aiyar*[1] that the Privy Council never intended to make any distinction between alienations made by the widow for consideration and alienation made by the widow without consideration, I agree with these learned Judges (Abdur Rahim and Ayling JJ.) that such a distinction is not warranted by the decision of the above Privy Council case *Bajrangi Singh* v. *Manokarnika Baksh Singh*[2] and I therefore respectfully dissent like them from the case *Pilu* v. *Babaju*[3] which draws such a distinction and from some of the observations in the judgments in *Rangappa Naik* v. *Kampti Naik*[4] to a similar effect.

I am also clear that the distinction sought to be made between the consent given by the reversioner to the alienation of part of the estate and the consent given by him to the alienation of the whole estate, is also not warranted by the Privy Council decision.

I agree with Wallis J. at page 376 of I. L. R. 31 M. that the effect of decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*[2] is to overrule the Full Bench decision in *Maduramuthu Nadar* v. *Srinivasa Pillai*[5] and to lay down that even partial alienations by a widow are valid when made with the consent of the next reversioners. I agree further with the learned Chief Justice and Wallis J. in the same case, that consent to future alienations must stand on the same footing as consent to or ratification of, past alienations. Again the distinction sought to be made between a consent given by the next reversioner to alienations made by the widow to third persons and a giving by the reversioner to the widow herself an absolute estate in the property is a distinction which does not appeal to my mind as a sound distinction which can be supported on a proper legal basis. If the reversioner can consent to an alienation by the widow to a third person so as to give an absolute estate in the alienated property to that third person, I do not see any principle of law which could be invoked for holding that the widow herself could not be given the same absolute estate by the reversioner's consent. Supposing the widow relinquishes the property to the reversioner by a proper instrument and he on the same day by the same instrument or by another contemporaneous instrument sells back the property to the widow for consideration conveying

1. (1912) Mad. W. N. 758.
2. (1907) I. L. R. 30 A. 1.
3. (1909) I. L. R. 34 B. 165.
4. (1907) I. L. R. 31 M. 366.
5. (1897) I. L. R. 21 M. 128.

Raghupathy v. Kannamma.

Sadasiva Aiyar J.

to her the absolute estate, which he himself got or by her relinquishment, she could of course so surrender the property to the reversioner to invest him with an absolute estate though she herself had only a widow's-estate. If she could do so and if he could at the same time give her an absolute estate by an instrument of the same date, what is there in common sense to prevent the same effect being produced by the reversioner receiving consideration and by an instrument properly worded and executed in favour of the widow consenting to her acquiring the said absolute estate without all the above circumlocution ? I think such distinctions merely give rise to unnecessary litigation and ingenious involved argument and they seem to my mind not based on really sound principles of law.

On the above grounds I would also dismiss the second appeal with costs.

Sundara Aiyar J.—With regard to the distinction between an alienation supported by consideration and a gift, I prefer not to decide that point as the learned Vakil for the Appellant did not really contend that there would be any difference between the two except with reference to questions arising under Sec. 41 of the Transfer of property Act. I may state, however, that my present inclination is to adopt the same view as my learned brother and Abdur Rahim and Ayling JJ have taken.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir R. S. Benson Officiating Chief Justice and Mr. Justice Sankaran Nair.

The Sessions Judge of Coimbatore — *Petitioner.**

v.

Immudi Kumara Kangaya and others. — *Accused.*

Sessions Judge, Coimbatore v. Kangaya.

Criminal Procedure Code Ss. 208, 210, 213, 347—Magistrate's duty to issue summons to witnesses named by accused—Late application.

The procedure that has to be followed by a committing Magistrate with regard to evidence *produced* before him by the accused is quite different from that prescribed in regard to evidence not produced before him but what the accused desires him to obtain by the issue of process.

An accused cannot delay asking for processes against witnesses until the last moment ; and a Magistrate is under no duty to issue summons merely because the accused asks for them if in his opinion there be no sufficient grounds to grant the application.

Obiter:—The directions in S. 347 Cr. P. C. "to stop further proceedings" only signifies "stopping" proceedings *as a trial.*

*Cr. M. P. No. 305 of 1912. — 18th September 1912.

Sessions Judge, Coimbatore v. Kangaya.

Reference Under S. 438 of the Cr. P. C. praying that in the circumstances states therein the High Court will be pleased to quash the commitment of the accused in Sessions Case No. 60 of 1912 and Register Case No. 8 of 1912 on the file of the Sub-Magistrate of Kangayam.

B. N. Sarma for the *Public Prosecutor* for the Crown.

M. O. Parthasarathi Aiyangar for accused.

The Court made the following

Order :—In this case the Sessions Judge moves us to quash a commitment made to his court on the ground that the committing Magistrate refused to summon certain witnesses whom the accused desired to be examined by the Magistrate under S. 208 of the Criminal Procedure Code prior to his making the commitment. It appears that examination and cross-examination of the witnesses for the prosecution was closed on the 5th June last and accused were examined on the same day and stated that their Vakil would file written statements on their behalf. The case was therefore adjourned to the 8th June when the written statemants were put in and the Vakil of the accused argued that there was no sufficient evidence for the prosecution to justify a commitment. Owing to the absence of one of the accused (who was on bail) the case was adjourned to the 11th June and then again to the 20th June and then the present application was for the first time made to summon and examine some sixteen witnesses for the defence. The Magistrate refused to do so as he held that the application was made too late, and he drew up a charge and committed the accused to the Sessions on the same day. For the accused it is argued that Ss. 208, 239, 210 of the Criminal Procedure Code rendered it compulsory on the Magistrate to issue the summonses and examine the witnesses as requested by the accused, and reliance is placed on two unreported decisions of this Court and on the decisions *Queen Empress* v. *Ahmadi*[1] and *Emperor Muhammad Hadi.*[2] We do not think that the contention of the accused can be supported. S. 208 (1) of the Criminal Procedure Code, no doubt, requires the Magistrate to record "all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the Magistrate," and sub-section (3) of the same section enacts that "If the complainant, or the officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness * * * * * the Magistrate shall issue such process

1. (1898) I. L. R. 20 A. 264. 2. (1904) I. L. R. 26 A. 177.

Sessions Judge, Coimbatore v. Kangaya.

unless, for reasons to be recorded, he deems it unnecessary to do so." It will be observed that sub-section (1) contemplates the production of evidence by the prosecution or by the accused, without the aid of the Magistrate: sub-section 3 contemplates the intervention of the Magistrate to secure the attendance of witnesses and in regard to this evidence the Magistrate has a discretion for reasons to be recorded by him to refuse to issue process, if he deems it unnecessary to do so. When, therefore, S. 210 requires "the evidence referred to in S. 208 sub-sections (1) and (3)" to be recorded before a charge is drawn up, it does not require the Magistrate to record the evidence of witnesses whom, in the exercise of the discretion given by sub-section (3), he has deemed it unnecessary to summon. This procedure appears to be convenient and reasonable whereas the procedure contended for by the accused, viz., that he may delay asking the Magistrate to summon his witnesses until the last minute before the charge is drawn up and then require him to summon and examine his witnesses, would lead to undue delay in the commitment of cases and the evils which such delay would entail. The proceedings before the Magistrate is only an inquiry preliminary to the trial and while the law in order to avoid unnecessary commitments is careful to require the Magistrate to examine any witness produced before him by the accused, and provides for the Magistrate also summoning and examining witnesses for the defence before a charge is drawn up and even gives the Magistrate a discretion (S. 212) to examine witnesses for the defence after the charge is drawn up and to then cancel the charge and discharge the accused (S. 213) it does not compel a Magistrate to summon and examine witnesses for the defence after a charge has been drawn up or even before the charge had been drawn up if the Magistrate for reasons to be recorded, deems it unnecessary to do so.

This distinction between the duty of the Magistrate in regard to evidence *produced* before him by the accused and evidence not produced before him, but which the accused desires him to obtain by the issue of process has not always, we think, been borne in mind by the Courts and the omission seems to have led the learned Chief Justice of the Allahabad High Court *Emperor* v. *Muhamad Hadi*,[1] to state the rule in terms wider than those of the code and wider also than those used in *Queen Empress* v. *Ahmadi*,[2] which he refers to in support of his statement of the rule. (See also the unreported decision of this Court in Cr. M. P. No 298 of 1911). Mr. Sarma for the Public Prosecutor has drawn our attention to the case of

1. (1904) I. L. R. 26 A. 177.
2. (1898) I. L. R. 20 A. 264.

Sessions Judge, Coimbatore v. Kangaya.

Phanindranath Mitra v. *Emperor*,[1] in which it is held that S. 347 of the Criminal Procedure Code "lays down that when a Magistrate has made up his mind to commit an accused for trial 'he shall stop further proceedings" and commit the accused for trial, and that this section is not to be read as subject to the provisions in Ss. 208 to 210 to which we have referred. We are unable to accept this view or to rely on S. 347 in support of the Magistrate's action.

Having regard to the subject matter of S. 346 and S. 347 and to the corresponding Section in the Code of 1872 (See. S. 221 of that code and *Empress of India* v. *Ilabi Buksh*,[2] we think that the directions in S. 347 to "stop further proceedings" does not justify a Magistrate in disregarding the directions in Ss. 208 to 210, but only requires him to stop proceeding with the case *as a trial* and instead to commit the case to the sessions for trial by that court "under the provisions herein before contained" *i.e.*. under the provisions of Ss. 208 to 210 and the other provisions in chapter 18 of the Code. In the present case we agree with the Magistrate that the application by the accused to summon and examine their witnesses was so long delayed that the Magistrate was justified in refusing to accede to it at that stage. We therefore see no reason to quash the commitment.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Napier.

B. Runga Rao... ... . *Petitioner*.* (Accused.)

Ranga Rao. *In re*

Jurisdiction—High Court—Restoration of Criminal Revision dismissed for default.

The High Court is not competent to restore to its file a criminal revision petition dismissed for default.

Obiter :—In the case of a criminal appeal dismissed for default of appearance of the pleader, the High Court may restore it under S. 421 Cr. P. C.

Petition to restore Criminal Revision Petition No. 499 of 1912 preferred to the High Court against the order of the Sessions Judge of Bellary in Criminal Appeal No. 38 of 1912 and Crl. M. P. No. 326 for 1912 for stay of proceedings in Calendar Case No. 3 of 1912 on the file of the Deputy Magistrate of Adoni and to rehear the case and the petition.

S. Srinivasa Aiyangar and *R. Narayanasami Aiyar* for petitioner.

The Public Prosecutor (*L.A. Govindaraghava Aiyar*) for the Crown.

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1. (1908) I. L. R. 36 C. 48.
2. I. L. R. 2 A. 1910.

*Cr. M. P. No. 327 of 1912. 11th September 1912.

Ranga Rao. *In re*

The Court delivered the following.

Judgment:—This is a petition to restore to the file Criminal Revision Petition 499 of 12 and Cr. M. P. 326 of 1912. Criminal Revision Petition 499 of 12 was a petition to this Court to revise an order of the Sessions Judge of Bellary in Criminal Appeal No. 38 of 12 in which he ordered a re-trial of the case before him. The petition came before this Court and the order passed on it was "Dismissed for default." The present petition is to restore it. It is clearly laid down in Referred Trial No. 40 of 05 of this Court that the High Court has no power to review its judgment in a referred trial. Their Lordships the Chief Justice and Moore J. considered the question as beyond argument. The same view has been taken by the Calcutta High Court in *In the matter of Gibbons*[1] and by the Bombay High Court in *Queen-Empress* v. *Bimappa Bin Ramanna.*[2] The language of S. 369 of the Criminal Procedure Code has been considered and the words have been treated as referring to the power of review given to the High Court under S. 434 on a point specially reserved by the Judge presiding at Sessions. Mr. Srinivasa Aiyangar who argued the point did not suggest that the decision of the High Court in revision stood on a different footing. This point has also been decided in *Queen-Empress* v. *C. P. Fox*[3] and *Queen-Empress* v. *Durga Charan*[4] where it was held that the High Court has no power to review an order made in the exercise of its revisional jurisdiction. He argued, however, that where a petition was dismissed for default there has been no hearing and therefore the High Court can review the order dismissing it. He relies on a case reported in 7 M. H. C. Appendix XXIX. That is a ruling to the effect that, where a Criminal Appeal has been rejected without the appellant's pleader being heard under the section corresponding to the present S. 421 of the Criminal Procedure Code, if it appears that the pleader had not a reasonable opportunity of being heard, the Court could restore the case to its file. We have no doubt that this is correct, for the language of S 421 requires a reasonable opportunity to be given and if such reasonable opportunity is not given the Court has no jurisdiction to dismiss the appeal. He also relies on some unreported cases of the High Court of Calcutta. In our opinion in cases of Criminal Revision no distinction can be made between an order passed without hearing the petitioner and one in which he is heard. It must be borne in mind that the revisional power of the High Court is exercised at its own discretion. No petitioner has a right to be heard and the High

1. (1886) I. L. R. 14 C. 42.
2. (1894) I. L. R. 19 B. 732.
3. (1885) I. L. R. 10 B. 176.
4. (1885) I. L. R. 7 A. 672.

Ranga Rao *In re.*

Court is not compelled to interfere with a judgment brought to its notice unless it so thinks fit. It was also argued that this power to re-hear a petition once dismissed is inherent in the High Court. We asked Mr. Srinivasa Aiyangar to produce any authority to shew that such a power to review or alter its judgment has ever been exercised by the High Court in England and he has been unable to do so. The proposition is accepted both in Halsbury's Laws of England and in Archbold's Criminal Practice that where a judgment is once complete the High Court has no power to alter it. A power to restore cases to its file might of course be conferred on Criminal Courts in India by statute, just as it has been conferred in civil matters, but in the absence of any such statutory provision and in the face of the decisions referred to we are unable to hold that this Court can review or alter a judgment or order completed and passed.

The petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Sankararama Aiyar ... ... *Petitioner* * (Defendant).

v.

R. Padmanabha Aiyar... ... *Respondent* (Plaintiff).

Sankararama Aiyar *v.* Padmanabha Aiyar.

C. P. C. S. 24, Cl. 4, S. 96—"Small Cause Court"—Court invested with Small Cause Jurisdiction—Appeal from decree on Original Side in a Small Cause Suit—"Trying any Suit"—"From a Small Cause Court"—Transfer of Small Cause Suit to Original Court—Direction to try as Original Suit.

The words "Court of Small Causes" in S. 24, Cl. 4, C. P. C. includes Courts invested with Small Cause Jurisdiction.

No appeal lies from a decree of District Munsif on the original side in a suit transferred to him for trial from a Subordinate Judge's Court on its Small Cause Side, *Ramachandra* v. *Ganesh*[1] and *obiter* in *Dulal Chandra Deb* v. *Ram Narain Deb*[2] dissented from, and the same will be the case even though the suit was not immediately transferred to the trying court from the Small Cause Side of the Subordinate Court but after an intermediate transfer to another Munsif's Court on its original side.

Per *Sundara Aiyar*, J.—The transfer by the District Judge of a Small Cause Suit to an original Court is itself valid, but not the direction to try it as an Original Suit; and the invalidity of the direction does not affect the validity of the transfer itself.

Petition under S. 115 of Act V of 08 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tuticorin in A. S. 156 of 08 preferred against the decree of the Court of the Additional District Munsif of Tinnevelly in O. S. No. 132 of 07.

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*C. R. P. No. 686 of 1910. 9th September 1912.

1. (1898) I. L. R. 23 B. 382. 2. (1904) I. L. R. 31 C. 1057.

Sankara-rama Aiyar. v Padma-nabha Aiyar.

Krishna Aiyar for petitioner.

S. Srinivasa Aiyar for respondent.

Krishna Aiyar.—No appeal lay to the lower appellate Court, simply because a Small cause suit was tried by another Court on transfer as an original suit. See. S. 24 C. P. C. Cl. 4 and Ss. 32 and 33 of Provincial Small Cause Courts Act—Section 33 has not been referred to in any of the decisions.

S. Srinivasa Aiyar.—S. 96 Civil Procedure Code gives the right of appeal in all cases tried on the original side of a court ; and it is on the other side to show that, that right has been taken away. The appellant relies on S. 24 Cl. 4. Therefore the question is as to what is meant by the "Small Cause Court" in S. 24. For that purpose we have to turn to the several provisions of the Civil Procedure Code itself in the first instance ; see Ss. 3, 7 and Or. 50. According to Ss. 3, 7 of that Act and Or. 50 Civil Procedure Code a distinction is made in the language of the Code between a "Small Cause Court and a " Court invested with the jurisdiction of a Small Cause Court." Next reference may be made to the several sections of the Provincial Small Cause Courts Act; see Ss. 5, 27, 28, 29, 32 Cl. 2, 33 and 35. The Small Cause Court has as such distinct characteristics laid down in the Act. See also for the distinction between the two classes of courts the decisions in *Balkrishna* v. *Lakshman,*[1] *Bhagvan Dayalji* v. *Balu,*[2] *Krishna* v. *Bhan*[3] *Shankarbai* v. *Somabhai,*[4] *Ramchandra* v. *Ganesh,*[5] *Sambai Dhangi* v. *Ram Vither Sarang,*[6] *Kaneshai* v. *Dost Mahomed Khan,*[7] *Mangalsen* v. *Rupchand,*[8] *Dulal Chandra Deb* v. *Ram Narain Deb.*[9]

Again in this case the transfer itself was not made to the trying court from a Small Cause Court. First, the transfer was made from the Small Cause Side of the Subordinate Court to the Srivaikuntum Munsif's Court to be tried as an original suit; and from there the suit was transferred to the Additional Munsif's file at Tinnevelly. S. 24 Cl. 4 will not apply under the circumstances.

The reason why there should be a difference between a Small Cause Court as such and a Court invested with Small Cause Jurisdiction is best explained in *Dulal Chandra Deb* v. *Ram Narain Deb.*[9]

As for S. 33 of the Provincial Small Cause Court, it does not lay down anything as regards the point in controversy; secondly the reason for that enactment was merely affirm to the view laid

1. (1879) I. L. R. 3 B. 219.
2. (1883) I. L. R. 8 B. 230.
3. (1893) I. L. R. 18 B. 61.
4. (1900) I. L. R. 25 B. 417.
5. (1898) I. L. R. 23 B. 382.
6. (1903) I. L. R. 28 B. 244.
7. (1883) I. L. R. 5 A. 274.
8. (1891) I. L. R 13 A. 324.
9. (1904) I. L. R. 31 C. 1057.

Sankara-rama Aiyar. v. Padma-nabha Aiyar.

down in cases like *Bhagwan Dayatji* v. *Balu*[1] that for the purposes of execution a court exercising both the original and Small Cause jurisdictions should be considered as two separate courts. This is made clear by a reference to the report of the Select Committee.

Krishna Aiyar in reply referred to *Akhsay* v. *Hiram Ram*.[2]

The Court delivered the following

Judgment:—The question for decision in this Civil Revision Petition is whether an appeal lay to the District Court of Tinnevelly from the judgment of the Additional District Munsif of Tinnevelly in O. S. 132 of 07. The Subordinate Judge to whom the appeal was transferred for disposal states that the suit was originally in the Subordinate Judge's Court of Tuticorin as Small Cause No. 1484 of 06; from that Court it was transferred to the District Munsif's Court of Srivaikuntam. The order of transfer contained a direction that the suit should be tried as an original suit along with another suit. It was again transferred from the latter Court to the additional District Munsif's Court of Tinnevelly. The additional District Munsif dismissed the suit and the plaintiff preferred an appeal to the District Court. A preliminary objection was taken before the subordinate Judge that the appeal did not lie as the decision of the Additional District Munsif must be taken to have been that of a Small Cause Court. The Subordinate Judge overruled this objection. Now section 24 clause (4) of the Civil Procedure Code lays down " the court trying any suit transferred or withdrawn under this section from a court of Small Causes shall, for the purposes of such suit be deemed to be a Court of Small Causes." The first clause of the section authorises the District Court to transfer the suit to any court subordinate to it and competent to try or dispose of the same. That the District Munsif's Court of Srivaikuntam and the additional Munsif's Court of Tinnevelly were both courts competent to dispose of the suit cannot be doubted. The argument of the appellant is that by virtue of clause (4) of the section the decision of the Tinnevelly Additional Munsif was the decision of a court of Small Causes and consequently under S. 27 of the Small Cause Courts Act no appeal lay from his decision. It is first argued for the respondent that the transfer to the Tinnevelly Additional District Munsif's Court was from the Srivaikuntam Court and that that court was not a Court of Small Causes within the meaning of S. 24 of the Civil Procedure Code and that the Tinnevelly Additional Munsif's Court could not therefore be said to have tried a suit transferred from a court of Small Causes. It is no doubt

1. (1885) I. L. R. 8 B. 230. 2. (1908) I. L. R. 35 C. 677.

Sankararama Aiyar. v. Padmanabha Aiyar. —— Sundara Aiyar J.

the fact that the Srivaikuntam Munsif had not been invested with jurisdiction to try Small Cause suits of the value of this suit. But there are two answers to the respondent's argument. One is that under Clause 4 of S. 24 of the Civil Procedure Code the Srivaikuntam Court was a Small Cause Court with respect to this suit when it was transferred to it from the Subordinate Judge's Court of Tuticorin. The argument that it would become a Small Cause Court only at and for the purpose of the trial cannot be upheld. If this contention be sound in what capacity could the Srivaikuntam Court pass orders in the suit before the trial? It cannot be said that it could do so except as the court trying the suit. The other answer is that the clause does not say that the transfer should be immediately from a court of Small Causes and the suit while pending in the Additional Munsif's Court of Tinnevelly may be said to have been one transferred from the Subordinate Judge's Court of Tuticorin. The construction contended for the respondent would hardly be in accordance with the object of Clause (4) which is to provide for the trial as a Small Cause Court of suits which are transferred from Courts of Small Causes. All this is of course on the assumption that the Subordinate Court of Tinnevelly which was invested with the powers of a Small Cause Court was a Court of Small Causes within the meaning of S. 24 of the Civil Procedure Code. The most important contention of the respondent is that the Subordinate Judge's Court of Tinnevelly cannot be regarded as a Court of Small Causes. It is of course not disputed that the Court was not a Small Cause Court constituted under the provisions of Act IX of 1887 by the authority competent to constitute Small Cause Courts under that Act. It was invested with Small Cause Jurisdiction by the Government of Madras under S. 28 of the Madras Civil Courts Act. The respondent argues that Clause (4) directs to be deemed as Courts of Small Causes only courts trying suits transferred from what are strictly Small Cause Courts and not from courts invested with Small Cause jurisdiction. The point for decision is; can the Subordinate Judge's Court of Tuticorin be regarded as a Small Cause Court within the meaning of S. 24 of the Civil Procedure Code? Mr. S. Srinivasa Aiyar who has argued the case ably and very fully for the respondent has drawn our attention to S. 7 of the Civil Procedure Code and to Order L, where the Code speaks specifically of courts invested with Small Cause Jurisdiction along with Small Cause Courts and he argues that therefore S. 24 when it speaks of Small Cause Courts cannot be taken to include courts invested with small cause jurisdiction but not constituted as Small Cause Courts. Now there can be

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no doubt that one object of providing in S. 24 cl (4) that court trying a suit transferred from a Small Cause Court shall be deemed a Small Cause Court is to make the decision of the court final in the same manner as the decision of the court from which the suit was transferred ,would be. The finality of the decision of a Small Cause Court is enacted by S. 27 of the Provincial Small Cause Courts Act. S. 24 C. P. C. must clearly be read with the provisions of the Provincial Small Cause Courts Act. Now turning to the latter Act S. 32 extends to courts invested with Small Cause Jurisdiction various provisions applicable to Small Causes viz., the class of suits over which jurisdiction is to be exercised, the exclusion of the jurisdiction of other Courts in those suits, the practice and procedure applicabe to Small Cause Courts and the finality of the decrees and orders passed by those Courts etc., S. 35 of the Provincial Small Cause Courts Act like S. 7 of the Civil Procedure Code refers to cases where a Court of Small Causes or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause, ceased to have jurisdiction with respect to a case, and it makes provision as to which court is to have jurisdiction in such cases. If the matter had stood here there would be very much force in the respondent's objection that the mere investiture of a Court with Small Cause powers would not make it a Small Cause Court. But S. 33 provides that " a court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction and the same Court with respect to the exercise of its jurisdiction in suits of a Civil nature which are not cognizable by a Court of Small Causes, shall for the purposes of this Act and the Code of Civil Procedure, be deemed to be different courts." It is difficult to give a proper meaning to this section except by interpreting it as laying down that a court invested with Small Cause jurisdiction becomes for the purpose of its cognizance of suits which it is competent to try as Small Cause suits, a Small Cause Court. This is clear from the expression " for the purposes of this Act and ths Code of Civil Procedure." What can be the meaning for saying that a Court invested with Small Cause jurisdiction is different from itself trying regular suits for the purposes of the Small Cause Courts Act except that it is to be regarded as a Small Cause Court. The Civil Procedure Code makes certain sections of the Code not applicable to Small Cause Courts. The reference to the Civil Procedure Code is evidently to make the excepted sections of the Civil Procedure Code applicable to courts invested with Small Cause jurisdiction. The respondent's Vakil was invited to mention any object that this section could have in view if it was not to make courts invested

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with Small Cause jurisdiction, Small Cause Courts. He was not able to make any suggestion that we could accept. It is true that S. 32 would, strictly speaking, be, unnecessary on this interpretation of S. 33 and that the reference to courts invested with Small Cause jurisdiction in S. 35 might also be said to be unnecesary. But apparently the Legislature considered it better to mention specifically courts invested with Small Cause jurisdiction in S. 35 and to provide expressly in S. 32 for the rules of procedure and finality of decisions and the other provisions of that section applying to courts invested with Small Cause jurisdiction. At any rate it seems to be impossible to give due effect to S. 33 unless it is regarded as making courts invested with Small Cause jurisdiction Small Cause Courts. On this construction of S. 33 there can be no doubt that the Subordidate Judge's Court of Tuticorin in exercising Small Cause Jurisdiction must be regarded as a Small Cause Court. So far as the reason for the rule laid down in S. 24 is concerned, there is no ground for distinction between a transfer from a Court of Small Causes and a Court invested with Small Cause Jurisdiction. The decisions of both classes of Courts are final. The object of clause 4 of S. 24 is to give finality also to the decision of the Court to which the suit is transferred. S. 24 admittedly has the effect of giving the finality of a Small Cause Court's Judgment to decisions of Courts not constituted Small Cause Courts. If this could be done with respect to suits transferred from Small Cause Courts it is diffticult to see why it should not be done also with respect to those transferred from courts invested with small cause powers. It may be as pointed out in *Dulab Chandra Deb* v *Ram Narain Deb*[1] a grave thing to take away the right of appeal where the Legislature has not considered the desirability of investing any particular court with small cause jurisdiction but the gravity applies equally to cases where the transfer is from Small Cause Courts. Rightly or wrongly the Legislature has thought it proper to give finality to the decisions not only of small cause jurisidiction but to the decisions of a third class of courts viz., of courts to which a suit of small cause nature is transferred in certain cases. The exact scope of such cases is immaterial in considering the gravity of what is done by the Legislature. The case *Dulab Chandra Deb* v *Ram Narain Deb*[1] no doubt contains a strong *dictum* in respondent's favor. The exact point in the case was whether when a Munsif having Small Cause jurisdiction was succeeded by one having no jurisdiction an appeal would lie from the decision of the latter who tried the suit on the regular side.

1. (1904) I. L. R. 31 C. 1057.

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There can be no doubt that S. 24 would have application to such a case and an appeal would lie. *Ram Chandra* v. *Ganesh*[1] undoubtedly is in respondent's favour. But although Ss.32 and 35 are commented on in that judgment no reference is made to S.33. It may be observed that *Dulab Chandra Deb* v.*Ram Narain Deb*[2] also makes no reference to that section. *Mangel Sen* v. *Rupchand*[3] which followed an earlier Allahabad decision is on the other hand in appellant's favor. These are really the only decisions in point. In *Bhagvan Dayalji* v. *Balu*[4] Mr. Justice West observed that a court exercising Small Cause jurisdiction by special investiture of powers and the same court exercissing its ordinary original jurisdiction may be regarded as two different Courts. *Akshay Kumar Shake* v. *Hira Ram Dosad*[5] cited for the appellant is not really in point as the learned judges there decided the case on a consideration of S. 32 of the Act. The view adopted by the Allahabad High Court appears to be the right one. Another question arises for decision in consequence of the District Court transferring the suit from the Subordinate Judge's Court of Tuticorin to the Srivaikuntam Court directing the latter court to try it as an original suit.

Having regard to S. 24 of the Civil Procedure Code it had apparently no power to do so. It was suggested during the arguments that the order of transfer should therefore he regarded as wholly void. But this does not appear to be the correct view to be taken. The District Judge in making the direction must be taken to have acted in excess of jurisdiction. He had power to transfer the suit, but he had no jurisdiction in doing so to order that the suit should be tried on the regular side contrary to the provision in S. 24 of the Civil Procedure Code that the court trying a suit transferred from the Small Cause Court shall be deemed to be a Small Cause Court. The direction to try it as a regular suit must be regarded as invalid but it does not effect the order of transfer itself. See Bayley on Jurisdiction Vol. I. S. 29. The decision of the Munsif was therefore that of a Small Cause Court under S. 24 of the Civil Procedure code and no appeal lay to the Subordinate Judge's court. The decree of the Subordinate Judge therefore must be reversed and that of the District Munsif restored with costs here and in the appellate Court.

Sadasiva Aiyar, J.—Mr. Srinivasa Aiyar who argued the respondent's case with great learning, acuteness and fairness has

1. (1898) I. L. R. 23 B. 382.
2. (1904) I. L. R. 31 C. 1057.
3. (1891) I. L. R. 13 A. 324.
4. (1883) I. L. R. 8 B. 230.
5. (1908) I. L. R. 35 C. 677

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brought forward all the available arguments and the two propositions enunciated by him are (a) that a Court trying a suit transferred not from a Court of Small Causes in the technical sense but from a Subordinate Judge's Court merely invested with Small Cause powers is not itself a Small Cause Court whose decision is not subject to appeal, (b) that even if the District Munsif's Court of Srivaikuntam to which the suit was transferred be a Small Cause Court, the Tinnevelly District Munsif's Court to which there was a further transfer and which actually tried the suit was not a Court of Small Causes. I am clear after hearing the whole matter elaborately discussed that the Legislature intended to take care that a suit originally and properly instituted as a Small Cause suit should not lose that nature even if it be tried by another court afterwards by reason of transfer of proceedings. When S. 33 of the Provincial Small Cause Courts Act says that a Court invested with Small Cause jurisdiction shall be a different Court from itself when it is exercising its ordinary Civil Jurisdiction it could only mean that such Court shall be deemed to be a Small Cause Court different from an ordinary Civil Court. The observations in *Dulab Chandra Deb* v. *Rama Narain Deb*[1] and the case in *Ram Chandra* v. *Ganesh*[2] ignored this section 33 and the effect of these decisions is rather to criticise the the policy of the Legislature found in S. 24 clause (4) C.P.C. than to follow its plain provisions as is done in *Mangel Sen* v. *Rupchand.*[3] As regards the argument that the trying Court did not get its jurisdiction by an immediate transfer from the court in wihch the suit was originally instituted as a Small Cause suit, S. 24 clause (4) does not say that the Court trying any suit transferred or withdrawn from a Court of Small Causes and which shall be deemed therefore to be a Small Cause Court should also be a Court to which the transfer had been immediately from the Small Cause Court in which the suit was originally instituted. This contention therefore also fails. The appeal was therefore heard by the Subordinate Judge without jurisdiction and his decree must be reversed and that of the District Munsif restored with costs.

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1. (1904) I. L. R. 31 C. 1057. 2. (1898) I. L. R. 23 B. 382.
3. (1891) I. L. R. 13 A. 324.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar.

Kollipara Venkamma ... ... *Petitioner.**

Pleader—Compromise—Special Vakalat—Giving power to compromise.

Venkamma *In re*

A Vakil in India is both the solicitor who acts and the counsel who pleads.

Where the Vakalat given to the Vakil in a case empowered him to compromise the suit, no second or special Vakalat is necessary to empower him to compromise it.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the District Munsif of Ellore in O. S. No. 271 of 1910.

T. Prakasam for Petitioner.

The Court delivered the following:—

Judgment:—The petitioner who was the plaintiff before the District Munsif's Court could have appealed to the District Court against the Munsif's decree if she considered that that decision was legally wrong. If she had done so and if she failed even in appeal she could have come up in second appeal to this court "as a suit relating to a claim for maintenance."

Instead of doing so she has put in this revision petition under S. 115 C. P. C., 225 days after the District Munsif's decision. This is not a case in which "no appeal lies" to the High Court and hence S. 115 cannot apply. There is no question of jurisdiction, perversely illegal decision, or material irregularity of procedure involved but only a question whether the District Munsif committed an error of law in allowing the plaintiff's Vakil's consent to bind the plaintiff in the decision of the suit. It is admitted that the Vakil's Vakalat empowered him to compromise the suit but the contention is that without a special and separate Vakalat (other than the engagement Vakalat which empowered the Vakil to compromise) the Vakil's consent to the rate of maintenance proposed by the other side is not binding on the plaintiff.

I see no reason to hold that a Vakil who has got a Vakalat empowering him to compromise an action should get a second Vakalat which contains the same power simply because the first Vakalat empowers him to do other things also besides empowering him to compromise. A Vakil in the Indian Courts is both the solicitor who acts and a counsel who pleads for his client. In *Mathews*

* C. R. P. No. 159 of 1912. 16th September 1912.

Venkamma. *In re*

v. *Munster*[1], it was held that, where the defendant's counsel in the absence of the defendant and without his express authority assented to a verdict for the plaintiff for £ 350 with costs and withdrew all imputations against the plaintiff, the settlement was a matter which was within the apparent general authority of counsel and was binding on the defendant. In *Butler* v. *Knight*[2] it was held that, even when the client had expressly prohibited her solicitor to accept any compromise and even though she had obtained judgment and decree, she was bound by the act of her solicitor in accepting a compromise so far as the other party was concerned, if that other party had no notice of any limitation having been imposed on her solicitor's authority and that her only remedy lay in an action for negligence against her solicitor. In the present case the Vakil had express authority to compromise the suit. I think that serious inconvenience would result to the administration of justice by courts if, even after a Vakil has been given power to compromise the suit by the plaintiff who engages him and after the opposite party on the faith of that Vakalat has offered terms of compromise which were accepted and acted upon, and after the court had, on the faith of the assurance of the legal practitioners passed its decision by their consent, the plaintiff should be allowed to take the objection that she did not give a special second Vakalat mentioning only the power to compromise. There is no allegation even in the Revision Petition that she had prohibited the Vakil to compromise the suit notwithstanding that the Vakalat to act gave him such power and that defendant knew that her Vakil had no such power (that the Vakalat gave him such power is spoken to by her Vakil who was examined in the Revision Petition case; see Mr. Gomaji Row's order on the Review Petition.)

The Privy Council held in *Rajnunder Narain Rae* v. *Bijai Govind Singh*[3] that when a Vakil admitted that the rental of a Zemindary in dispute was a certain sum the admission was binding on his client. *Jagapathi Mudaliar* v. *Ekambara Mudaliar*[4] was a case in which the Vakalat did not give power to the Vakil to compromise the suit. (That there is no distinction between Vakil and counsel in these matters is clear from *Venkatanarasimha Naidu* v. *Bashyagarulu Naidu*[5]).

This petition in revision put in by the plaintiff is therefore rejected.

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1. (1887) 20 Q. B. D. 141.
2. (1867) 36 L. J. Ex. 66.
3. (1839) 2 M. I. A. 253.
4. (1898) I. L. R. 21 M. 247
5. (1899) I. L. R. 22 M. 538.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the High Court of Bombay.]

Present:—Lord Shaw, Sir John Edge, Mr. Ameer Ali.

Shrimant Raja Bahadur Raghoji Rao ... *Appellant**

v.

Shrimant Raja Lakshman Rao Sahib ... *Respondent.*

Raghoji Rao *v.* Lakshman Rao Sahib.

Grant—Construction—Evidence contemporanea exposito—Inam—Sarangam—Impartibility—Jaghir—Incident of grant in.

Contemporanea expositio as a guide to the interpretation of documents is often accompanied with danger and great care must be taken in its application. When the admitted ambiguity in a grant covers the geographical and pecuniary extent it is legitimate to a court to observe the footing upon which the grantors, namely, the Government and its successors and officials from the date of the grant and for a long time proved.

A grant in Jaghir of the ordinary character is no grant of the soil but a personal grant only of the revenue. It is personal and not hereditary and is resumable at pleasure and "necessarily, impartible" and a custom of succession by a primogeniture would be radically inconsistent with the personal and non-transmissive character of a grant in Jaghir and consequently not subject for proof.

The words sarangam and inam are not mutually exclusive. The term "inam is one of more generic significance applicable to a Government grant as a whole.

The question in the case was about the significance of the words "lands attached to Deur" a term used in a grant and as to whether they included the lands belonging to the grantee in the Satara District by yielding an annual income of Rs. 3.000 or whether it covered all the properties in the Bombay Presidency yielding a revenue of Rs. 12,000 per year.

This was on appeal from a judgment and decree of the Bombay High Court which affirmed the decree of the First class Subordinate Judge of Poona.

Kenworthy Brown, Lowndes and *Dick* for appellant.

L. DeGreuyther, K. C., Ross and *Gidgil* for the respondent.

Their Lordships' judgment was delivered by

Lord Shaw:—This appeal is made against a decree of the High Court of Juticature at Bombay, dated the 14th November 1907, which affirmed a decree of the Subordinate Court of Poona, dated the 7th December 1904. The plaintiff (respondent) and the defendant (appellant) are brothers. The main object of the suit is contained in the first prayer of the plaint, and to have it declared that the whole of immoveable and moveable estate mentioned in the

* 30th July 1912.

schedule annexed to the plaint belongs to these two brothers as equal owners thereof. The elder brother, the Defendant Appellant, is Rajah of Deur. And the claim is resisted by him upon the ground that the various properties referred to had been succeeded to by him, under the law of primogeniture, as an appanage to the title of Rajah conferred upon him by a *sanad* issued under the hand of the Governor-General, Earl Canning, in the year 1862.

The properties are situated in the Districts Poona, Ahmednagar, Satara and Sholapur, all in the Presidency of Bombay. They include five *mouzahs* or villages, together with various *vatans*, *haqs*, and cash allowances, set forth in the schedule. It was matter of agreement in the High Court that the main question in the case should be treated as one applicable to the villages or *mouzahs* and that when the question of partibility or impartibility should be settled in regard to them, the remaining items in the schedule should follow that decision.

Of the *mouzahs* mentioned, that of Deur is situated in Satara. In the course of the proceedings it has been admitted that the property in the Satara District is an appanage of the title of the Rajah of Deur, is impartible, and is succeeded to along with the title and position of Rajah accordingly, that is to say, by the rule of primogeniture. It is submitted by the appellant that the same result should have followed with regard to the rest of the properties in dispute. The question in the case is whether that submission is correct.

The whole of the properties are, as stated, within the Bombay Presidency. This fact throws light upon the construction of many of the official minutes, despatches, entries and others, referred to in the case, and appears to be one of cogency. It can hardly be denied that the language used in all these official documents for a period of about fifty years is at least *ex-facie* language applicable to the possessions of the Rajah in the Bombay presidency as a whole.

Points of great historical interest are naturally suggested by a review of the pedigree put in by the parties. The records of the Bhonsle family—the Rajahs of Nagpur—are bound up during a long period of time with many stirring adventures and achievements in the course of the Mahratta ascendency and its decline. The position of the family was one of great note from the middle of the 17th, and during the whole course of the 18th, and first half of of the 19th, centuries. The possessions of these Rajahs were extensive, stretching throughout many portions of the Central Provinces,

the North-West Provinces and Berar, as well as of the Bombay Presidency.

The last of the Rajahs of Nagpur, Raghoji III, held the title, estates and rights, from the year 1817 till his death in 1853. The forfeiture of 1818 followed by the treaty and free gift of 1826 need not be referred to, the facts of ownership and possession being substantially as stated. He died without issue. He himself was an adoptive son of one Pursoji Bhonsle, and with his death in these ciscumstances the Bhonsle dynasty of Nagpur came to an end. It is an admission of parties that in that year title of Rajah of Nagpur lapsed and that the estates and rights of the deceased Raghoji III fell to the British Government.

The widows of Raghoji, however, adopted Janoji in the year 1855. He survived till 1881, leaving behind him the two sons who are contestants in the present case.

During the mutiny of 1857 a female member of the family, the Rani Baka Bai, appears to have powerfully and loyally assisted the British cause and to have rendered services worthy of official recognition. She was the widow of former Rajah of Nagpur namely, Raghoji II, and she was anxious for the continuance in the family of the title of Rajah and the attachment to it of such property as would mark and maintain its dignity. The Government of the day declined to restore the Nagpur title, but, was willing to create—by *sanad* issuing from the Governor-General—a fresh Rajaship. The title pitched upon was derived from Deur, a small village in the *Satara* District of the Bombay Provinces. It is manifest from the official documents issued that it was one of the objects of the Government to make such a provision—in land and revenues accompanying the title—as, though small and unimportant if viewed relatively to the ancient Nagpur possessions, would still be sufficient to gratify, so far, the desire of Baka Bai, and to support in becoming dignity the newly created title.

It is accordingly important to note what were the exact terms of the *Sanad* under the hand of Earl Canning, Governor-General. It is dated the 10th, October 1861. The Subordinate Judge of Poona has closely examined it and the translations. As stated by the learned Judge, it is written in Urdu and its text is as follows, it being supersigned by Lord Canning and bearing the seal of the Government of India:—

Sanad granted by His Excellency the Viceroy and the Governor-General of India in Council to Raja Janoji Bhonsle Bahadur conferring upon him the title of Raja Bahadur of Deur.

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'Whereas it has been proved and verified that Maharani Baka Bai Saheb was loyal towards the noble British Government and the good behaviour and loyalty of that family during the Mutiny has been proved and verified; in recognition thereof the title of Raja Bahadur of Deur together with the lands attached to Deur has been conferred upon and given on this auspicious occasion to that Meherban himself and his heirs in succession whether begotten or adopted in perpetuity and the *sanad* thereof has been executed. It must be deemed incumbent that in return of this gift and kindness, you will always remain loyal to the noble British Government and you will look upon this *sanad* a perfect one.

The point of the case is: What meaning is to be given to the words "lands attached to Deur"? Are these lands limited to the village of Deur itself? Or do they extend to the possession in the Satara District? Or do they cover the possessions as a whole which lay within the Presidency of Bombay?

Neither party to the case maintains that the grant should be confined to the lands in the Village of Deur alone; and it is conceded by the respondent that other lands in the Satara District must be held to be included. This concession is perfectly reasonable for otherwise the lands attached to Deur if confined to the village of Deur itself would reduce the maintenance of the dignity of the Rajah almost to a shadow.

But the mere inclusion of all the Satara lands also reaches a very inconsiderable total. These lands are worth over Rs. 3,000 per annum. The villages, lands and others in the whole of the Bombay Presidency, mentioned in the plaint, yield a total revenue of over Rs. 12,000 and it would appear from this that if all these lands were dealt with as lands which were attached to Deur by the *sanad* they would form taken together a fund for the maintenance of the dignity of the Rajah which could not be said to be overample. But if the lands attached to Deur are confined to those in the Satara District alone, then the result of such a construction of the *sanad* is to set up this Rajah with an appanage of about Rs. 3,000 per annum for the support of dignity and title. Their Lordships are surprised to learn that during all the years since the *sanad*, in many of which the Court of Wards have had possession and in all of which the Government have had cognizance of the facts, no one apparently until the institution of this suit ever thought of maintaining that the possessions attached to the position of Rajah were of the slender proportions described. Upon the contrary, they have throughout been dealt with as those within the Bombay Presidency at large.

As mentioned, the properties of the former Rajah were situated not only in the Bombay Presidency, in which their extent

was very limited, but in the Central Provinces and Berar. A large donation or stipend of Rs. 1,20,000 per annum was enjoyed by the late Rajah Janoji at the time of his death. After that event, in 1881, the Government of the day had to consider the question of the allowances to be made to his successors, namely, his two sons. A pension amounting to Rs. 90,000 was fixed, and in the despatch of the 10th February 1882, by the Assistant Secretary to the Chief Commissioner, the grounds are explained of the distribution of this pension. "The two sons," it is said, "will succeed to the landed property of the late Rajah in the Central provinces and Berar, and to the personality in equal shares. This is in accordance with the Hindu Law and Maratha custom. The elder son will succeed to the title of Rajah of Deur and to the estate in the Bombay Presidency which goes with, that title. The value of this estate is, however, comparatively small, the bulk of the landed property of the late Rajah being situated in the Central Provinces and Berar. There will not, therefore be much difference in the private income of the two sons should they hereafter separate." This passage is quoted as an indication of the view which is repeatedly exhibited in the documents with regard to the attitude of the Government, from whom the grant by way of *sanad* proceeded. This interpretation was undoubtedly that the Rajah of Deur should take the estates in the Bombay Presidency, which were comparatively small, as an appanage of the title; that these should accordingly follow the rule of primogeniture, whereas the larger and more important estates in the Central Provinces and Berar should be partible equally between the two sons.

Contemporanea expositio as a guide to the interpretation of documents is often accompanied with danger, and great care must be taken in its application. But in the present case their Lordships do not feel themselves able to reject the assistance which it affords. The *sanad* upon which these important rights are founded is a document of a general and informal character. It admittedly is capable of a variety of constructions. The extreme literal construction—its confinement to the single village of Deur—is adopted by neither party. And when the ambiguity covers the geographical and pecuniary extent of an admittedly ambiguous grant their Lordships think it legitimate to observe what was the footing upon which the grantors, namely, the government and its successors and officials, from the date of the grant and for a long period of time, proceeded.

It may be pointed out that since 1881, namely, since the death of Janoji, the question of partibility was, of course, practically and

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sharply raised and the fact is that the whole of income derived from the estates in the Bombay Presidency, amounting to about Rs. 12000 per annum, has been uniformly treated as the exclusive income of the elder son, namely, the persent appellant. This was done both while he and his brother were wards in the Court of Wards and at other times. That Court managed the possessions of the appellant until he came of age in 1893. Again in 1895 the Court of Wards re-entered, by request of the Rajah, into possession and management for a time. In 1899 the younger brother came of age, the property in the Central Provinces and Berar was divided equally, and the Bombay estate was treated as impartible and continued with the Rajah as an appanage of the title. In the opinion of their Lordships this throughout was a correct course; and the present suit, the object of which is to diverge from that course, is not in accordance with the rights of parties.

In one view, what has been said might appear to be sufficient for the disposal of this case. But in the judgments of the learned Judges of the Courts below, and in the arguments addressed to their Lordships, further considerations were urged as assisting towards a conclusion and falling to be dealt with. There can be little doubt that the whole of the lands in issue were originally *Jaghir* lands, and the legal position of such property *quoad* succession, and the competency or incompetency of assisting the construction of the *sanad* of 1862 by such considerations, were much discussed. There are three points with reference to the position of property such as that now in suit which stand logically clear of each other, and with regard to which there has been a certain element of confusion. These three points are, first, was the land impartible? Secondly did the law of hereditary succession apply to it? and thirdly was it subject to the law of primogeniture?

The Subordinate Judge, after referring to the fact that some of the villages are referred to as *Jaghirs* in the old records, is of opinion that "that fact *per se* is not sufficient to make them impartible." If this be stated as a conclusion with regard to the *Jaghir* tenure in general, their Lordships cannot agree with it; but upon the contrary, they are of opinion that the following statement in the judgment of the High Court is correct, namely, "The grants were manifestly grants in *Jaghir* of the ordinary character, that is to say, they were personal and not hereditary, and were resumable at pleasure. Being personal and temporary they were "necessarily impartible." This accurately distinguishes between partibility as such, and any consequence, whether in the direction of hereditary

or primogenital succession, which may be supposed to flow from such a fact. The impartibility of *Jaghir* lands is in truth entirely separated from the idea of succession by the fact that the impartible lands were held together as a unit in the hands of one man who was rendering personal service to the Government of the day. It may be that upon his death a fresh grant, again to one man, and again in return for personal service, was made; and it may also be that the one man selected was in the ordinary case the eldest son; but these matters of practice were not consequences of law and the impartibility and unity which attached to personal service was not related to, but, on the contrary, was distinct from, the idea of succession by force of law to the impartible lands.

It is at this point that the case appears to have been confused and encumbered by a plea put forward by the appellant to the effect that the lands in question were not only impartible and hereditary, but were, by custom, subject to the law of primogeniture. Once grant that the lands were *Jaghir* and impartible as such, a custom of the kind alleged was not a subject for proof, because such a custom would have been radically inconsistent with the personal and non-transmissive character of a grant in *Jaghir*. Their Lordships agree in holding with the Courts below that this case accordingly cannot be decided on the custom alleged.

All that remains on this issue, consequently, is the fact that prior to the regrant by Earl Canning the lands had been formerly *Jaghir*. But this term implied no grant of the soil, but a personal grant only of the revenue to the grantee. The *Marathi* equivalent to the term *Jaghir*, namely, *saranjam*, came in course of time to be applied to the lands; and no doubt it was also a fact in the history of the property that the senior living male of the family had in the ordinary case succeeded to it.

In those circumstances, it is interesting to observe what was the delivery order issued with reference to the lands which were the subject of the *sanad*. This forms a not unimportant item to that *contemporanea expositio* to which reference has been made. Much importance—and in their Lordships' opinion, too much importance—has been attached in the judgments of the Courts below to the distinction between the term *inam* and *saranjam*. The importance has reached this point that the learned Judges treat the lands of Satara as referred to in one or two of the documents as *saranjam*. by way, as they apprehend, of distinction from the other lands which are treated as *inam*. In their Lordships' view, the terms are not mutually exclusive in the sense indicated. The latter term, namely,

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inam, is one of mere generic significance, applicable to a Government grant as a whole. But in the next place it is a very striking fact in this case that in the delivery order now being referred to (as indeed in many of the subsequent documents) the rights in the Bombay Presidency are dealt with comprehensively and as covered not by one name, but by all, or at least many of the names applicable to land and revenue rights. In the Mamlatdar's order, for instance, of the 19th March 1862, applicable to the village of Mouje Devi Nimbgay, one of the properties in Ahmednager, the matter is treated of in this way. The village "is a jaghir to the Bhonsles and as a village was placed under japti (attachment) the revenue of the same was received for being credited in Government records." Then follows the definite statement:—"But the *vatan inam saranjam, Hakks*, &c.,.........have been entered in the name of Janoji........." Therefore certain definite orders are given pursuant to Government Resolution, "directing the said village, *vatan*, &c., to be delivered" into the charge of Janoji's managers. It would therefore accordingly appear that the term *saranjam* was not in point of fact confined to the lands of Satara. This ground of the judgments of the courts below accordingly disappears.

A matter of much significance must now be dealt with. On the death of Janoji in 1881 the question of partibility or impartilibity—there being two sons of that Rajah—became matter for definite consideration and regulation. What light is thrown upon the case by the contract at and after this juncture of the Government, including the Court of Wards, which was charged with the correct distribution of these two sons' shares? Upon this head their Lordships do not conceal that they have viewed with some dissatisfaction the conduct of certain parts of the Plaintiff's case. On the 6 May 1882, an important letter was written by Mr Lawrie, manager of the estates, to the Deputy Collector, "Satara, Sholapur, Ahmednagar, and Poona." That is to say, this letter was addressed to the persons acting as Collectors in reference to all the estates within the Bombay Presidency which were the subject of issue in this case. He forwards his appointment by the Deputy Commissioner of Nagpur as manager of the estate of the late Rajah's minor sons; and then there follows this passage, or what was supposed to have been this passage, as the document was produced in the suit: "I have the honour to request you to be so good as to cause mutation of names to be made for all villages held by the late Rajah in your collectorate in favour of his two sons. Rajah Raghojerao Bhonsle (only for Satara) and Laxmanrao in equal shares with my name as manager." So stated, this document would appear to suggest that all the properties

except that of Satara were partible; and this would have been an important adminicle of evidence to that effect. The document, however, has a history. It is deposed to in the evidence of the Plaintiff's own witness Abaji Belaji. Interlineations and remarkable alterations occur in the document, and the witness confesses, "I cannot say why and by whose order the words 'only for Satara, 'two,' the 's' added to the word 'son,' and the words 'and Laxmanrao in equal shares with my name as manager' were written." As the document stands it suits the Plaintiff's case; but it appears to be legitimate, and, indeed, proper and just, to read the document without the doubtful and unexplained interlineations and alterations. So read, the letter is as follows: "I have the honour to request you to be so good as to cause mutation of names to be made for all villages held by the late Rajah in your collectorate in favour of his son Rajah Raghojerao Bhonsle." The letter is addressed to the Collector, not of Satara alone, but to the Collectors of Satara, Sholapur, Ahmednagar, and Poona, and it would, so read, accordingly appear to demonstrate that at the important time when the administration of the deceased Rajah Janoji's estate was taken up by government, all the estates in the Bombay Presidency were treated without exception, as an appanage to the title of Rajah.

It is right that a further reference should be made to a cognate topic. It would rather seem that the learned Judges of the courts below have been induced to treat as authentic various entries in the Collector's books which were not the entries as originally made but were entries subject to "correction;" a correction made upon an *ex parte* application on behalf of the Plaintiff. This application was preferred, and apparently granted, behind the back of the Defendant, and during the course of this present litigation. The date of the suit was the 22nd August 1900, and on the 5th August 1901 a memorial was presented to the Governor in Council at Bombay with the statement: "This is forwarded to the Chief Secretary by letter of the 13th August 1902." It is plain from a perusal of these documents that certain registers, including in particular the registers of the Collector of Ahmednagar together with certain despatches had been the subject of investigation on behalf of the Plaintiff and that that investigation had revealed facts which were considered to be contrary to his interests. The application admits that in these documents the Collector of Ahmednagar had "been directed to treat the villages referred to in the petition as impartible *saranjam*." Then the letter proceeds: "The villages of Devi Nomgaon, Jat Deola, Jalalpur, in the Ahmednagar District, were up to 1864 regarded as *Inams* and *Saranjams*, and the *Deshmukhi* and other *Hakks*

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as *Vatans*, as contradistinguished from *Saranjams*. There was and is no room for asserting that they were ever treated as impartible *Saranjams* held on political tenure." This remarkable document winds up thus. "In view to the facts and arguments above set forth, you will be pleased to issue orders to correct the land Revenue Register by expunging that portion of it in which" the villages "are specified as political *Saranjams*." The facts and arguments here referred to are simply those which have been urged in the present litigation. The one fact outstanding from the whole of these proceedings is that the argument now preferred, to the effect that the Satara property and that alone was treated as *Saranjam*, while the other properties were throughout treated as *Inam*, is contrary to what is admitted to have been the original entries in the books referred to. In these circumstances, it appears to their Lordships to be quite unsafe to place reliance upon a denomination of these lands dependent upon a "correction" which appears, or is alleged, to have been made while the case was *subjudice*, and upon an *exparte* representation. Their Lordships think that the original state of the Records before the so-called corrections were made was that alone to which a Court of Law should have looked. This would at least be the safe and ordinary rule, and there do not appear to be any facts in the present case to ground an exception to it. It is not for their Lordships to pronounce upon the procedure by which such "corrections" of official documents and records can be possible in those districts in circumstances such as are here disclosed.

Various difficulties are presented by reason of expressions which appear in despatches from those in authority in the Central Provinces. In those despatches language is used which would appear to signify that the lands attached to Deur in the Bombay Presidency were the Satara lands alone. The language is not clear, and it had reference to a matter lying beyond the jurisdiction of the writers. Difficulties also arise with regard to the terminology employed in some of the entries in which *Saranjam* is applied to Satara and *Inam* to the other districts, whereas in others there appears to be an application of both terms to the same lands and in various districts.

Their Lordships, upon the whole, have had little difficulty in coming to the conclusion that too restricted an application has been made by the Courts below of the term "the lands attached to Deur." They think the expression extends to the whole scheduled lands in the Presidency of Bombay. They will humbly advise His Majesty that the judgment of the Courts below should be reversed, that the

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lands referred to in this suit are impartible, that they are attached as an appanage to the title of the Rajah of Deur and that the suit should be dismissed with costs here and below.

The Respondent will also pay the costs of a Petition for further documents which was before the Board on the 24th February 1911.

Solicitors for the Appellant: *Speechly, Mumford and Craig.*

Solicitors for the Respondents. *Messrs. Latleys and Hart.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar, and Mr. Justice Sadasiva Aiyar.

R. Nataraja Iyer ... ... *Petitioner.* (*Accused.*)*

Nataraja Iyer.

Certiorari—Jurisdiction of High Court—Cr. Pr. C. S. 476—" Divisional Officer deciding income-tax appeal"—Court—No Revision to Board of Revenue—Letters Patent Cl. 8—Effect—Object of—Order under S. 476 Cr. P. C. passed after the enunciation of proceedings—Legality—Interference in revision.

A Divisional Officer acting under the Income-Tax Act as an appellate tribunal is not a Criminal Court; and the High Court has no power to revise the proceedings of the Divisional Officer under S. 435 Cr. P. C.

A Divisional Officer is a Court in hearing appeals under the Income-Tax Act. No revision petition lies to the Board of Revenue in respect of an order for prosecution passed by the Divisional Officer under S. 476 Cr. P. C. in connection with an income-tax appeal before him.

Per *Sundara Aiyar* J.—In passing an order under S. 476 Cr. P. C. long after the proceedings, the Divisional Officer, even assuming that he was bound to pass the order at a particular time as indicated in *Aiyakannu Pillai* v. *Emperor*[1] the officer could not be said to have passed it without jurisdiction and the High Court is not bound to interfere and quash proceedings on *certiorari* even in cases where the defect can be said to be one of jurisdiction.

Per *Sundara Aiyar* J (*Sadasiva Aiyar* J, dissenting.)—The High Court has no jurisdiction to issue a writ of certiorari on an officer beyond the limits of its Original Jurisdiction.

Per *Sadasiva Aiyar* J.—The power to issue the writ of *certiorari* to quash judicial proceedings passed by persons in the moffussal rests in the High Court. *In the matter of Amir Khan*[2] followed.

Meaning of the word "Court" dwelt on.

The powers of the High Court with regard to the writs of *Habeas Corpus* and *Certiorari* are the same.

Nothing shall be intended to be beyond the jurisdiction of the superior Courts unless expressly taken out of it. Object of Cl. 8 of the Letters Patent and its effect considered.

Per *Sundara Aiyar* J.—Cl. 8 of the Letters Patent does not widen the jurisdiction given to the Court in Civil and Criminal matters by Cl. 21, 22 and 23.

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*Cr. R. C. No. 509 of 1911. 30th August 1912.

1. (1908) I. L. R. 32 M. 49.
2. (1870) 6 B. L. R. 392.

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Petition Under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Deputy Collector of Ariyalur, dated the 1st day of November 1910.

S. Swaminathan for petitioner.

Public Prosecutor (*L. A. Govindaraghava Aiyar*) for Government.

S. Swaminathan.—A writ of *certiorari* can be directed to all inferior Courts and judicial bodies; and a writ is issued by the court of King's Bench for the purpose of quashing proceedings instituted in inferior courts without jurisdiction. Halsbury's Laws of England Vol. X p. 349-50 and Vol. IX p. 167, 168, on the meaning and scope of the writ of *certiorari* referred to: *Rex* v. *Woodhouse*[1]. The Supreme Court has all the powers of the Court of Queen's Bench. This writ has been expressly mentioned in the charter of the Supreme Court. Under 24 and 25 Vict. Ch. 104 the High Court has got all the powers of the Supreme Court which it superseded. So far as this Court is concerned it is a Court of record and has all the powers unless the powers have been specifically restricted by the legislature. The High Court has inherent power to redress all wrongs. Having inherited this power to issue the writ this Court is not restricted as to the scope of the writ. S. 47 of the Charter Act of 1800 refers to the writ and the Supreme Court had jurisdiction to issue writs to all Magistrates subordinates thereto. *In re Amir Khan.*[2] *Ilbert's Government of India* pp. 54 and 55. *In re Justices of the Supreme Court of Bombay,*[3] *Navinchoo* v. *Naratamdas.*[4] The Supreme Court had inherent power to issue writs to all persons subject to its jurisdiction whether appellate or original. *In re Venkata Rao*[5] is authority for the position that the Court has got such a power to issue writs. In the case of *In re Amir Khan*[2] the question was of the powers of issuing writs of Habeas Corpus to the Jailor in Patna and Alipore. The argument was rested on the ground that the officer when the writ was issued was a British subject. The writ of certiorari has been issued by the High Courts since 1862 *Pirbhai Khimji* v. *B. B. & C. I. Ry. Co.*[6] *Reg.* v. *Nanamowji,*[7] *Reg* v. *Nuthalal Pitambur,*[8] *Reg* v. *Sakaram,*[9] *Reg* v. *Ramdas Samaldas;*[10] *Nandu Lal Bose* v. *Corporation for the town of Calcutta.*[11] In this case the writ was issued against the President of the Corporation

1. (1906) L. R. 2 K. B. p. 501.
2. (1870) 6 Ben. L. R. 392.
3. (1829) 12 E. R. p. 222, 259.
4. (1882) I. L. R. 7 B. 5 at 13.
5. (1911) 21 M. L. J. 832.
6. (1871) 8 Bom. H. C. R. O.C.J. 59.
7. (1871) 8 Bom. H. C.R.Cr. Case 1.
8. (1873) 10 B. H. C. R. 102.
9. (1874) 10 B. H. C. R. 109.
10. (1875) 12 Bom. H. C. R. 217, 220.
11. (1885) I. L. R. 11 C. 275.

of Calcutta as that was considered a judicial body. *Jamuna Bai* v. *Sadagopa*,[1] *Stephen Lazar* v. *Colla Raghava Chetty*.[2] All these cases arose within the original Civil Jurisdiction of the High Courts; *Raja of Ramnad* v. *Seetharam Chetty*[3] 22 and 23. Vic. Ch. 106 S. 58. By virtue of this the company's servants became crown servants. The Revenue Divisional Officer is a servant of the Government. *In re Rudolf Stallmaun*.[4] This case was disposed of on the ground that certain preliminaries were not complied with: British subject includes Indian subjects. Nataraja Iyer.

L. A. Govindaraghava Aiyar (*Public Prosecutor*).—Art.47of the Charter Act definitely says in what cases the writ can be issued. In this case it can't be brought under Art. 21. The servant of the Company does not become the servant of the Government. Further this is not a suit or action within the meaning of Art. 21 which only gives jurisdiction beyond the ordinary Original Civil Jurisdiction. The words British subject originally meant European British subject. *In re Samuel Valentine Foy*[5] held that the Supreme Court had no power to send for records by writ of *certiorari* from company's Courts. *In the matter of James Pattle*[6] writ of *certiorari* was refused on the ground that the Supreme Court had no power to interfere when a British subject was convicted by a company's Court. There is not a single case where the writ was issued beyond the limits of the Supreme Court's Jurisdiction. Wherever the legislature wants the writs to be issued it definitely says so. Art. 21 and 22 will not help the petitioners. S. 8 merely says that Judges as Justices of the Peace can exercise the powers even in territories to be annexed hereafter. There is difference, in the language of S. 8 which speaks of the Chief Justice and the puisne justices while Ss. 21 and 33 speak of the Court. This shows that S. 8 does not speak of the powers of the Court but of Justices of the Peace; otherwise there is no necessity for the provision in Ss. 21 and 33. The marginal note is wrong. *In re Venkata Row* proceeds on the inherent powers of the High Court to punish for contempt. The writ of *certiorari* cannot stand on the same footing as contempt. In the case in 1 Cnapp 8 it appears that the person in custody was in British territory. Apart from the argument on the inheritance from the Supreme Court it is argued that High Court as a superior Court of record has inherent power to issue writs of *certiorari* over inferior Courts and judicial bodies. It cannot be said that *certiorari* is an

1. (1883) I. L. R. 7 M. 56.
2. (1839) 2 M. I. A, 164.
3. (1902) I. L. R. 26 M. 120.
4. (1911) I. L. R. 39 C. 164.
5. (1850) 2 Ind. Decisions 396—Taylor and Bell 209.
6. (1836) 1 Ind. Decisions O. S. 828—Fulton 313.

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inherent power though the King's Bench has it. As for the scope being wider the High Court has inherited the powers of the Supreme Court with all the limitations to which the Supreme Court was subject. The accused has another remedy. There is an appeal to the Board of Revenue under its administrative jurisdiction because the Collector is subordinate to the Board of Revenue. This is a judicial order of the Collector for which under the Madras Acts there is an appeal to the Board of Revenue. The income-tax Collector is a Revenue Officer. *Aiyakannu Pillai* v. *Emperor*[1] says he is a Court. The accused is referred to the Board of Revenue. *Queen Empress* v. *Munda Shetti*,[2] *Nalu Patia* v. *Emperor*,[3] S. 28 of the income-tax Act were referred to.

Dr. Swaminathan in reply :—It is only the District Collector that has power to grant sanction under the rules of the Madras Government 540 of Income-tax Act.

The Court made the following

ORDER :—*Sundara Aiyar*, J :—The proceedings which led up to the two petitions before us may be briefly stated as follows :—

The petitioner Nataraja Iyer was assessed to income-tax in an annual income of Rs. 4,400 for the official year 1910—11. He appealed against the assessment to the Revenue Divisional Officer of Ariyalur, who was the Collector of taxes under the Income-Tax Act, II of 1886. At the hearing of the appeal a sworn statement was taken from the petitioner. The appeal was rejected on the 30th July 1910. On the 25th August 1910 the Divisional Officer wrote to the Collector suggesting that sanction might be accorded for the prosecution of the petitioner for certain false statements contained in his sworn statement. The Collector apparently did not consider it necessary to take any steps. On the 15th October 1910, the Divisional Officer issued notice to the petitioner to show cause why an order under Section 476 of the Criminal Procedure Code should not be passed directing his prosecution for making false statements. On the 1st November 1910, the Divisional Officer passed final Orders under Section 476 directing the prosecution of the petitioner. The petitioner made two previous infructuous attempts to avoid prosecution to which it is unnecessary to refer in detail. *Criminal Revision Case* 509 *of* 1911 is an application to this Court under Section 435 of the Criminal Procedure Code to set aside the order of the Divisional Officer.

The petition is obviously untenable. Under Section 435, this Court has power to call for and examine only the record of a

1. (1908) I. L. R. 32 M. 49 at 51. 2. (1900) I. L. R. 24 M. 121.
3. (1911) I. L. R. 38 C. 368.

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proceeding before an inferior Criminal Court. The Divisional Officer certainly did not act as a Criminal Court in passing the order under Section 476. He apparently acted as a Revenue Court. Whether he was in reality a Revenue Court and had power to pass the proceedings are questions that will have to be subsequently dealt with. But it is clear that the order was not passed by him as a Criminal Court. The petition must therefore be dismissed.

Criminal Miscellaneous Petition No, 320 *of* 1911 is an application asking this Court to quash the proceedings of the Divisional Officer on the ground of absence of jurisdiction in him to pass the order. A writ of *certiorari* was applied for. This Court issued the writ and the record of the proceedings of the Divisional Officer has been sent up to this Court. The petitioner's contention is that the Divisional Officer in determining an appeal under the Income-tax Act did not act as a Court; and he had therefore no jurisdiction to pass an order under Section 476 of the Criminal Procedure Code; secondly, that even if he was a Court he had no jurisdiction to pass an order directing a prosecution long after the proceedings in the Income-tax appeal had been closed.

The learned Public Prosecutor, on the other hand, contends first that we have no jurisdiction to issue a writ of *certiorari* on an officer beyond the Original, Civil and Criminal jurisdiction of this Court; secondly, that this will not quash the proceedings on *certiorari* as the petitioner had other remedy open to him, because the Divisional Officer was a Revenue Court in hearing appeals under the Income-tax Act and the order was one which could be set aside by the Revenue Board to whom the Divisional Officer was subordinate; thirdly, that assuming that this Court has jurisdiction to quash an order of a Divisional Officer passed as a Revenue Court, there was no such defect of jurisdiction as to call for our interference and the case is not a fit one for the exercise by this Court of its discretionary power to quash the proceedings on *certiorari.*

The questions for our decision are :—

(1) Has this Court Jurisdiction to issue a writ of *certiorari* on an officer beyond the limits of its original jurisdiction ?

(2) Was the Divisional Officer a Court in hearing appeals under the Income-tax Act ?

(3) If he was a court should the petitioner have appealed to the Revenue Board to get the Divisional Officer's order set aside ?

(4) Was the order of the Divisional Officer bad for want of jurisdiction on the ground that it was passed long after the close of the Income-tax proceedings ?

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(5) Is this a proper case for the exercise of our discretion to quash the Divisional Officer's proceedings on *certiorari* ?

On the first question, after hearing the elaborate arguments on both sides, I have come to the conclusion that this Court has no power to issue the writ on an officer outside Madras. Section 9 of 24 and 25 Vic. Ch. 104 known as the High Courts Charter Act provides that the High Court shall have and exercise " all such Civil, Criminal,Admiralty,and Vice—admiralty,Testamentary, Intestate and Matrimonial jurisdiction, original and appellate, and all such powers and authority for, and in relation to, the administration of Justice in the Presidency," as Her Majesty may by Letters Patent grant and direct, and it further provides that " the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts." The old Supreme Court and the Court of Sudder Dewany Adawlut and Foujdarry Adawlat were abolished by the establishment of the High Court. (Section 8). Neither the Charter Act nor the Letters Patent of the High Court expressly conferred on it the power to issue a writ of *certiorari* outside the limits of its original jurisdiction. The question is whether it has such power under section 9 of the Charter Act in consequence of its having been possessed by the Supreme Court or by the Sudder Court.

It is admitted that the Sudder Court possessed no such power, although it apparently possessed some powers of superintendence over the Courts subordinate to it. See Cowell's " Courts and Legislative Authorities in India," page 109. But it is contended that the Supreme Court had the power. The powers of the Supreme Court were regulated by 39 and 40 Geo, III Ch. 79 which authorized His Majesty the King of England to constitute Supreme Courts for Madras and Bombay by Charter or by Letters Patent and Letters Patent were issued on the 26th December 1801 in pursuance of the Statute. In addition to the powers expressly given by that Statute and the Letters Patent, Supreme Court was to have all the powers possessed by the Recorder's Court which was then abolished. See clauses 4 and 55 of the Letters Patent. The Recorder's Court again which was established by 37 Geo. III Ch. 142 inherited all the powers possessed by the Mayor's Court established by 26 Geo. III Ch. 57. But none of these Courts had, in my opinion, the power to issue a writ of *certiorari* in cases of this sort. The Mayor's Court had Civil as well as Criminal Jurisdiction " over all British subjects

whatsoever who now reside or shall hereafter reside within any of the ports, factories, towns, lands or territories in the possession of the said United Company on the Coast of Coramandel, or in any other part of the Carnatic, or in the five Northern Circars, including those parts of the said Circars which lie within the Kingdom or province of Orissa, or within any of the dominions or territories of the Soubah of the Deccan, the Nabob of Arcot or the Rajah of Tanjore." (see section 30 of 26 Geo. III C. 57). It will be observed that the jurisdiction of the Court was confined to British subjects. There can be no doubt that the expression " British subjects " was intended to include only European British subjects, that is a native or a descendant of a native of Great Britain. The jurisdiction of the Recorder's Court was laid down in sections 10 and 11 of 37 Geo. III C. 142. Section 10 which extend to all " British subjects " residing within any of the territories subject to or dependent on the Government of Madras provided that the Court shall have full power and authority to hear and determine complaints against any of His Majesty's subjects (that is, British subjects) for any crimes, misdemeanours and oppressions and also all suits and actions whatsoever against them arising in territories subject to or dependent on the Government of Madras or within any of the dominions of the Native Princes of India in alliance with that Government, or against any person who at the time when the cause of action arose was employed by or was directly or indirectly in the service of the United Company or any British subject. Section 11 enacted that the Recorder's Court should have power to try all suits and actions either Civil or Criminal which by the authority of any Act of Parliament might at the date of the Act be tried by the Mayor's Court at Madras or by the Courts of Oyer and Terminer and Gaol delivery there, and all powers vested in the Mayor's Court or the Court of Oyer and Terminer were conferred on the Recorder's Court. Here again it will be noted that the jurisdiction of the Court was confined to British subjects, to persons in the employ of the Company or of a British subject within the territories subject to or dependent on the Government of Madras.

The jurisdiction of the Supreme Court is laid down in various clauses of the Letters Patent. Clauses 21 and 22 refer to civil jurisdiction. Clause 31 confers all the equitable powers of the Court of Chancery in England within the limits of the Court's jurisdiction. Clause 32 confers jurisdiction over lunatics and infants. Clauses 33 and 34 confer criminal jurisdiction. Clause 37 gives the Court ecclesiastical jurisdiction including matters relating to probates of wills and letters of administration. Clauses 41 and 42 confer

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admiralty jurisdiction. Under clause 21 the civil jurisdiction embraced the power to hear and determine suits and actions against British subjects in territories subject to or dependent on the Government of Madras or within the dominions of Native Princes in alliance with that Government or against employees of the Government or of any British subject. Clause 22 gave power to try suits against the inhabitants of Madras. Under clause 33 the criminal jurisdiction was confined to the town of Madras and the factories subordinate to it.

I must now refer to clause 8 on which much reliance was placed by the learned Counsel for the petitioner. It provides "the said Chief Justice and the said puisne Judges shall severally and respectively be, and they are all and every one of them hereby appointed to be, Justices and Conservators of the Peace and Coroners within and throughout the settlement of Fort Saint George and the town of Madras and the limits thereof and the factories subordinate thereto and all the territories which now are, or hereafter may be subject to or dependent upon the Government of Madras aforesaid and to have such jurisdiction and authority as our *justices of our* Court of King's Bench have and may lawfully exercise within that part of Great Britain called England as far as circumstances will admit." It is contended that notwithstanding the provisions of clauses 21, 22 and 33, this clause must be taken to confer jurisdiction on the Court throughout the territories subject to the Gevernment of Madras. I cannot agree with this contention. The subject-matter of this clause is, in my opinion, quite distinct from that of clauses 21, 22 and 33 which define and limit the Civil and Criminal Jurisdiction of the Court. The object of clause 8 was to confer certain specific powers on the Chief Justice and the puisne Judges. It is note-worthy that under this clause the Judges are severally appointed as Justices and Conservators of the peace and Coroners. Clauses 21, 22 and 33 define the jurisdiction of "the Supreme Court of Judicature" at Madras. It is the Court that possesses the powers conferred under clauses 21, 22 and 33. Each one of the Judges is a Justice of the peace and possesses the powers laid down in clause 8, and the powers consist in the jurisdiction and authority which the Justice of the Court of King's Bench had at the time, apparently as Justices respectively and not the jurisdiction and authority of the Court of King's Bench as such. The Judges of the Court of King's Bench, apart from other powers, had the right to issue a writ of *Habeas Corpus* under 21. Car. II C. 2. Clause 8 may be invoked to prove a similar right existing in the Judges of this Court to issue a writ of *Habeas Corpus* to be served on any one anywhere in the territories subject to the Madras

Government.' It is not contended that the Judges of the Court of King's Bench severally had the power to issue a writ of *certiorari* either under the Common Law of England or under any Statute. I cannot hold that clause 8 widens the jurisdiction given to the Court in Civil and Criminal matters by clauses 21, 22 and 33. It must be remembered that there were Courts of Justice established by the East India Company empowered to administer justice in the Company's territories. Clause 23 of the Letters Patent expressly makes reference to such Courts providing that "no action for wrong or injury shall lie against any person whatever exercising a judicial office in any country Court for any judgment, decree or order of such Court, or against any person for any act done by or in virtue of the order of such Court." The Supreme Court was a Court of limited jurisdiction and had no general control over the proceedings of the Courts erected and maintained by the East India Company. It is unnecessary to consider whether they had control in any and what specific classes of cases. I do not deal with the question of the powers of the Supreme Court to issue processes to witnesses and writs of execution outside the limits of its ordinary jurisdiction, in order to exercise the jurisdiction it actually had in Civil and Criminal matters. (See clauses 17, 27 and 28 of the Letters Patent; also section 13 of 37 Geo. III. Ch. 142 which relates the powers of the Recorder's Court in this matter.

Reference must be made to another Statute, 4 Geo. IV C. 71. That Statute empowered the Supreme Court of Madras to exercise the same rights and powers as the Supreme Court of Bengal possessed under any Statute. 13 Geo, III. Ch. 63, section 13 enacted that it shall be lawful for His Majesty to establish a Supreme Court "which said Supreme Court of Judicature shall have, and the same Court is, hereby declared to have, all Civil, Criminal, Admiralty and Ecclesiastical jurisdiction and to form and establish such rules of practice and such rules for the process of the said court and to do all such other things as shall be necessary for the adminstration of justice and the due execution of all or any of the powers, which by the Charter shall be granted and committed to the said Court and shall also be at all times a Court of Record and shall be a Court of Oyer and Terminer and Gaol delivery in and for the said town of Calcutta and the Factory of Fort William in Bengal aforesaid and the limits thereof and the factories subordinate thereto." Norman J. in *In the matter of Ameer Khan*[1] understood this provision as laying down that "the Court was to be a Court of Judicature for the Presidency of

1. (1870) 6 B. L. R. 392.

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Bengal as well as a Court of Record and Oyer and Terminer for the town of Calcutta." Section 14 and 17 of the same Statute defined the Civil and Criminal jurisdiction of the Court which were to extend only to British subjects and persons employed in the service of the Company or of British subjects and to others who had agreed that any matter should be determined by the Supreme Court. The question before the learned Judge was the right of the Supreme Court to issue a writ of *Habeas Curpus* for the production of a person confined beyond the limits of Calcutta. The learned Judge proceeded chiefly on section 4 of the Letters Patent of the Bengal Supreme Court corresponding to clause 8 of the Letters Patent of the Madras Court for holding that the Supreme Court had power to issue the writ. If the learned Judge intended to hold that section 13 of the Statute conferred powers to try suits and appeals throughout Bengal, Behar and Orissa, I am, with all deference, inclined to disagree with him. No clause in the Letters Patent gave the Supreme Court any appellate powers over the proceedings of the Company's Courts; and section 14 defining the civil jurisdiction was expressly limited in its scope. I am inclined to think that the phrase " for the said town of Calcatta and Factory of Fort William in Bengal aforesaid and the limits thereof and the factories subordinate thereto," qualifies the whole of the preceding portion of the sentence describing the jurisdiction of the Supreme Court. 4 Geo IV. C. 71 therefore did not extend the powers possessed by the Madras Supreme Court under the Statutes and Letters Patent direcly relating to that Court. It remains only to add that there is absolutely no doubt that the expression " British subjects " was undoubtedly not meant to include the Indian subjects of the East India Company. See the title of 37 Geo. III. C. 142 which refers to British subjects being concerned in loans to Native Princes; section 11 of the same Statute which speaks of natives or descendants of natives of Great Britain as apparently equivalent to British subjects: section 13 which speaks of the inhabitants of Madras to include the Indian subjects of the Company; clauses 21 and 22 of the Charter Act of 1800, the former of which refers to British subjects and the latter to inhabitants of Madras; clause 34 of Charter Act, which speaks of the King's subjects as equivalent to British subjects.

There is a provision in the Letters Patent of 1800 relating to the writ of *Certiorari*. Clause 47 provides that the Court of Requests (that is the Madras Court of Small Causes) and the Court of Quarter Sessions should be subject to the order and control of the Supreme Court in the same manner as the inferior Courts and

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Magistrates of England are subject to the Court of King's Bench and to that end the Supreme Court is authorized to "award and issue a writ or writs of *Mandamus, certiorari, procedendo* or error to be prepared in manner above mentioned and directed to such Court or Courts or Magistrates as the case may require, and to punish any contempt thereof or wilful disobedience thereto by fine and imprisonment." The learned Public Prosecutor relies on this clause as impliedly enacting that there is no power to issue a writ of *certiorari* in any case not covered by it. But if the power could be proved to exist otherwise, I would not be prepared to accept his contention ; for it is a well settled rule that the powers of a Superior Court can be limited or taken away only by some express provision to that effect. I am, however, satisfied on an examination of the Statutes relating to the subject that the Supreme Court did not possess the power to issue the writ on ony one beyond the limits of Madras, unless he was a British subject. The jurisdiction over British subjects outside Madras and persons in the employ of the East India Company or of British subjects to hear and determine Civil and Criminal cases against them would not affect the power to issue the writ. The Supreme Court had no general power or control over the Courts of the East India Company in the Moffussil or over their officers acting judicially. I believe this proposition would be correct even in cases where the officers exercising jurisdiction might be British subjects. The Divisional officer in this case is not a British subject in the sense in which that expression is used in the Letters Patent of the Supreme Court ; nor can he come within the designation of "one in the employ of the East India Campany." It cannot be held that, because the Supreme Court had jurisdiction over all servants of the East India Company, the High Court now has similar jurisdiction over all servants of the British Government. It is true, no doubt, that the Company's servants became the servants of the Crown by virtue of section 58 of 21 and 22 Vic. C. 106. But persons employed subsequent to that Statute by the Crown in the first instance cannot be regarded as falling within that description of persons.

I shall now proceed to deal with the cases which were cited during the arguments. There has apparently been no case in which any of the High Courts issued a writ of *certiorari* on an officer beyond the limits of its own original jurisdiction. In *Nundo Lal Bose* v. *The Coporation for the town of Calcutta* [1] it was issued against the President of the Municipal Corporation of Calcutta. In *Pirbhai Khumji* v. *B. B. and C. I. Railway Company*[2] *Reg.* v.

1. (1885) I. L. R. 11 C. 275. 2. (1871) 8 B. H. C. R. 59 (O. C. J.)

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Nuthalal Pitambar [1] and *Reg.* v. *Ramadoss Samaldas* [2] the Bombay High Court held that it had power to issue a writ within its original jurisdiction. In *In the matter of James Pattle*[3] an application was made for the writ on a Zilla Magistrate who, it was alleged, had convicted a British subject without jurisdiction. Ryan, C. J., observed, "The Court has no jurisdiction to remove convictions of Magistrates of Zillahs made on British subjects, but under 53 Geo. C. 3, section 155. The affidavit denies that the conviction is under this Act and states it to be under certain regulations of the Bengal Government—we have no power to issue the writ of *certiorari* and have no means of quashing the conviction were it returned into Court," Malkin, J., argeed with him. Grant, J. was of opinion that the conviction should be quashed; but his decision was not based on the ground that the Supreme Court had any general jurisdiction over proceedings of the Zillah Magistrates, but on the ground that the Supreme Court had jurisdiction in a particular class of cases. In *In re. Samuel Valentin Foy*,[4] a British subject was convicted by a Mofussal Magistrate. A writ of *Habeas Corpus* against the Jailor was applied for on the ground that he had no jurisdiction. Peel C. J., held that the Court had undoubtedly jurisdiction over all persons in the employment of the East India Company within Bengal, Behar and Orissa and the places annexed thereto in respect of torts and that therefore, whether a Jailor were a native or a European, if he had the character of a servant of the East India Company, the Court would have jurisdiction over his wrongful act of unlawful imprisonment. He went on to observe: "This Court, though it has an appellate jurisdiction from the Courts of the Company to a limited extent in certain classes of offences committed by British subjects, has no jurisdiction generally over those Courts. It has therefore no power to rectify a decision, if erroneous, or avert its consequences. Nor is a writ of *Habeas Corpus* the proper writ to rectify errors: it brings up the person only: a *certiorari* must issue in addition thereto in order to bring up documents, but this Court has no power to bring up by *certiorari* the proceedings of a Court of the East India Company generally: it follows therefore, that we can interfere only in the case where the proceeding is wholly without a judical foundation to support it, as it would be if the Court had no jurisdiction to try the subjectmatter. But the Judge had jurisdiction of the cause: he had jurisdiction to summon the alleged offender: he could not know before hand that

1. (1873) 10 B.H.C.R. 102 (O.C J) 2. (1875) 12 Bom.H.C.R. 217 (O.C.J.)
3. (1836) Fulton's Reports 313; 1 Indian Decisions, O. S. p. 828.
4. (1850) 1 Taylor and Bell. 219 S. C. (2 Indian decisions, old series. 396.)

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the offender was a British Subject: and the objection may be untruly made. It is a mixed question itself of law and fact, which must if raised, be tried and determined judicially in the Court." The Court is therefore necessarily acting judicially in the determination of that question. This Court has also a limited jurisdiction; if a party is indicted here for an offence committed in the Moffussal, it is necessary to prove our authority to try him by proving him subject to the jurisdiction." *In the matter of Ameer Khan*[1] and *In re Rudolf Stallmann*,[2] were cases where the right of High Court to issue a writ of *Habeas Corpus* into the Moffussal was in question. The point was not decided in the latter case. In the earlier case, Norman J, held that the High Court had power to issue writ, relying on clause 4 of the Letters Patent of the Bengal High Court. In *Jamuna Bai* v. *Sadagopa*,[3] this Court held that before rules were framed for the execution of the decrees of the High Court, it had power to sell property in the Chingleput District. Attention may be drawn to the observations of Innes J. as to the scope of the Court's jurisdiction over persons beyond the limits of its original jurisdiction. In his opinion it was confined to (1) European British subjects, (2) Native subjects, servants of the East India Company and (3) Native subjects everywhere in matters in which they have contracted to be amenable to the Supreme Court. It is clear that the learned judge did not consider that clause 8 of the Letters Patent of the Supreme Court conferred general power over all persons within the territories subject to the Government of Madras. In *Rajah of Ramnad* v. *Seetharam Chetty*,[4] the Court held that after this Court had framed rules for the execution of its decrees on the Original Side, it had no power to issue a warrant of arrest to be executed beyond the limits of Madras. In *In re the Bombay Justices*,[5] which related to the jurisdiction of the Supreme Court to issue a writ of *Habeas Corpus* beyond the limits of Bombay no judgment was delivered by the Judicial Committee of the Privy Council; but they made a report which was affirmed by His Majesty the King. The Committee reported that "the Supreme Court has no power or authority to issue a writ of *Habeas Corpus* to the gaoler or officer of a Native Court [referring to a Court established by the East India Company] as such officer, the Supreme Court having no power to discharge persons imprisoned under the authority of a Native Court."

1. (1870) 6. B. L. R. 392.
2. (1911) I. L. R. 39 C. 164.
3. (1883) I. L. R. 7 M. 56.
4. (1902) I. L. R. 26 M. 120
5. (1829) 12 E. R. 222 S. C. 1 Knapp P. C. P. I.

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The precedents referred to above are in my opinion against the contention of the petitioner's counsel that the Supreme Court had jurisdiction to issue the writ on an officer of the East India Company acting judicially beyond the limits of Madras. It is not contended that the application could be supported under section 15 of 24 and 25 Vic. C. 104 (the Charter Act) which lays down that the High Court shall have superintendence over all Courts which may be subject to its appellate jurisdiction. Assuming that the Divisional Officer was a Court he can hardly be said to have been a Court subject to the appellate jurisdiction of this Court. Dr. Swaminathan the learned counsel for the petitioner argued that a Superior Court like this Court has inherent jurisdiction to issue a writ to quash all proceedings of a judicial nature wheresoever and by whomsoever held within the ambit of its jurisdiction. He cited no authority in support of this proposition. I am not prepared to accept it. Our right of superintendence is confined to Courts subject to our appellate jurisdiction. There may be judicial proceedings held by officers not subject to our appellate jurisdiction. Decisions as to the income-tax payable by a person are not subject to review by this Court. The jurisdiction of this Court is defined by the Charter Act and by the Letters Patent constituting the Court. It will be entirely wrong in my opinion to hold that there is any power vesting in this Court over all persons exercising judicial functions within the limits of the Presidency of Madras. I hold therefore on the first question that this Court has no jurisdiction to quash on return to a writ of *certiorari* the proceedings of the Divisional Officer.

The second question is whether the Divisional Officer's order dated 30th July 1910 can be taken to have been passed by him as a court. In Criminal Revision Case No. 130 of 1900, Weir's Criminal Rulings, Volume 2, page 598, a Divisional Officer made an order under section 476 of the Criminal Procedure Code apparently on a report by a Tahsildar before whom an alleged false statement was made in an enquiry before him as income-tax officer. It was held that in doing so he did not act as a court and the order was set aside by *Subramania Aiyar* and *Sheppard* JJ. It does not appear how the learned judges thought they had jurisdiction to interfere in the matter. Possibly they regarded the order as one purporting to be passed by an inferior Criminal Court, as this Court's powers of revision are confined to orders passed by an inferior Criminal Court. Apparently, the false statement was made before the Tahsildar who recorded it for the purpose of determining the assessment to be levied. The case is distinguishable from the present one where the statement was made in the course of the hearing of an

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appeal made by the petitioner against an order fixing the assessment. The determination of the assessment in the first instance may not be an act of a court, although the assessing officer may have power to record statements. But an appeal against the assessment is dealt with by the Collector in the manner in which an appeal is disposed of by a Civil Court. He is bound to hear the appellant and has power to record evidence. [See sections 28 and 37 of the Income-tax Act II of 1886.] In *In re Kalidas Rewadas*,[1] the Bombay High Court held that an Income-tax Collector determining appeals against the assessment was not a court and that the High Court had no power to interfere in revision with an order passed by him under section 476 of the Criminal Procedure Code.. The Punjab Chief Court has held the contrary view. See *Emperor* v. *Rup Singh*,[2] and the majority of the Chief Court of Sindh also has done so. See *Emperor* v. *Deumal*.[3] What then is the test for deciding whether the Divisional Officer acted as a court or not? In *Naloo Patra* v. *Emperor*,[4] the proceedings of a Deputy Collector under the Land Registration Act in an application for the registry of the applicant's name as proprietor were held to be proceedings of a court. The learned Judges *Holmwood* and *Shraffuddin* JJ. would appear to have held that the circumstance that the Collector had power to summon and enforce the attendance of witnesses and compel them to give evidence and also compel the production of documents went to show that he was to act as a court. In *Queen Empress* v. *Munda Shetti*,[5] this court held that a Tahsildar, when holding an enquiry as to whether a transfer of names in a land register should be made or not is a revenue court. The Court observed that the Tahsildar " was authorized under Act III of 1869 to receive evidence and to decide whether the transfer should be made or not. He was, therefore in our opinion, a tribunal empowered to deal with a particular matter and authorized to receive evidence bearing on that matter in order to enable him to arrive at a determination." I am of opinion that the test for deciding whether the divisional officer was a court or not has been correctly laid down in the last case In *Rex* v. *Woodhouse*,[6] the test adopted appears to be whether there was a *lis* before the officer. In my opinion there was a *lis* in this case It is not necessary that there should be two parties arrayed as opponents in the matter to be decided by the officer. The petitioner had a right that he should not be made to pay a heavier tax than was properly assessable on his income. The officer had to decide as

1. (1906) 8 Bom. L. R. 477.
2. (1905) 3 Cr. L. J. 128.
3. (1909) 10 Cr. L. J. 395.
4. (1910) I. L. R. 38 C. 368.
5. (1900) I. L. R. 24 M. 121.
6. (1906) L. R. 2. K. B. 501.

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between the petitioner and Government what the petitioner's income was. He was bound to fix a day and place for the hearing of the petition. (See section 26). It is immaterial that in the appeal the Government would not be named as a respondent. Suppose a trustee or a guardian of an infant makes an application to a Court for leave to sell certain property of the beneficiary or the ward. There might not be any respondent in the application; yet it cannot be doubted that the order passed would be that of a Court. The petitioner was putting forward a right that his income should be assessed at a certain figure and the Government had equally a right that the assessment should be fixed on the true income of the petitioner. I am of opinion, therefore, that the Divisional officer acted as a Court in deciding the income-tax appeal. I may observe that I am prepared to agree with Dr. Swaminadhan that mere authority to receive evidence would not make the officer recording it a Court.

With regard to the next question whether the petitioner should have appealed to the Revenue Board against the Divisional officer's order under section 476, I am of opinion that the learned Public Prosecutor's contention cannot be sustained. *Abdul Raoof* v. *King-Emperor*[1] no doubt appears to support it but I am unable to agree with the view taken in that case. It is not pointed out under what provision of law the Revenue Board would have power to set aside the Divisional Officer's order. I do not think that the mere fact that the Divisional officer was subordinate to the Revenue Board in the discharge of his functions as a Revenue officer generally could be taken to give any revisional jurisdiction to the Revenue Board. It might be that, if instead of acting under section 476, he had accorded sanction under section 195 of the Criminal Procedure Code, such an order could have been set aside by the Revenue Board as the authority to whom he was subject in the discharge of his functions as an Income-tax officer. But it does not follow that that they had any jurisdiction to set aside an order passed under section 476. I cannot therefore, hold that the objection to the petition on the ground that there was other remedy open to the petitioner can be sustained, if this Court would otherwise have the power to interfere by a writ of *certiorari* and if the Divisional officer did not act as a Court.

The fourth and fifth questions are whether there was defect of jurisdiction in the Divisional Officer on the ground that the order under section 476 was passed some considerable time after the close of the income-tax proceedings. On this question there has been a conflict of judicial opinion. See *Aiyakannu Pillai* v. *Emperor*[2], *In re*

1. 4 A. L. J. 701. 2. (1908) I. L. R. 32 M. 49.

Chillashi Nanu Nair and others,[1] *In re Ramakristnamma*,[2] *In re Ratna Pillai* [3] and *Riazul Hussan* v. *Emperor*[4]. I consider it unnecessary to refer to the decisions of the other High Courts. In *Aiyakannu Pillai* v. *Emperor*[5] the Majority of the Full Bench of this Court were of opinion that a court has no power to pass an order under that section except as a part of the proceedings in which the offence referred to in the section was committed or brought to its notice. At the same time there is weighty judicial opinion to the contrary. It may be that according to the opinion of the majority of the Full Bench in *Aiyakannu Pillai* v. *Emperor*,[5] the illegality may be regarded as so serious as to entitle this Court to interfere in revision. But in my opinion it can hardly be said that the case is one of entire absence of jurisdiction in the Court passing the order. The Court has inherent jurisdiction under the Procedure Code to pass the order. Taking it that it is bound to do so at a particular time, it is not easy to say that the passing of the order after the lapse of the time would be a ground for holding it to be made without jurisdiction. At any rate I do not think that this Court would be bound to quash the proceedings on account of a defect of jurisdiction of this character. We are not bound to interfere and quash the proceedings on *certiorari* even in cases where the defect can be said to be one of jurisdiction. The matter rests entirely on our discretion which will be exercised if the justice of the case demands our interference. Even if we have the power to interfere, I am of opinion that the case is not one in which we should quash the order of the Divisional Officer.

I would therefore dismiss the petition.

Sadasiva Aiyar J:—In this case I have had the great advantage of having perused the exhaustive judgment of my learned brother. So far as the Revision Case No. 509 of 1911 is concerned I need say nothing more than that I agree with my learned brother for the reasons stated by him that that case ought to be dismissed. The other Criminal Petition No. 320 of 1911 which relates to the application under which a writ of *certiorari* has been issued involves several difficult questions of law on which I shall proceed to express my opinions at once.

As formulated in my learned brother's judgment the questions for decision are:—

1. (1909) 6 M. L. T. 92
2. (1910) 8 M. L. T. 81.
3. (1911) 10 M. L. T. 333
4. (1905) 10 Cr. L. J. 525.
5. (1908) I. L. R. 32 M. 49.

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1. Has this Court jurisdiction to issue a writ of *certiorari* on an officer beyond the limits of its original jurisdiction ?

2. Was the Divisional Officer a Court in hearing appeals under the Income-Tax Act ?

3. If he was a Court should the petitioner have applied to the Revenue Board to get the Divisional Officer's order set aside ?

4. Was the order of the Divisional Officer bad for want of jurisdiction on the ground that it was passed long after the close of the Income-Tax proceedings ?

5. Is this a proper case for the excrcise of our discretion to quash the Divisional Officer's proceedings on *certiorari* ?

On the questions 2, 3, 4 and 5 I agree in the conclusions of my learned brother. I think that the Divisional Officer was a Court in hearing appeals under the Income-Tax Act. The word 'Court' has numerous significations in the English language in various departments of human activity. Confining oneself to the significations of this term as used in the department of law, even in that single department the word has a very extended signification. Bouvier's Law Dictionary gives four meanings as follows:

(1) A body in the Government to which the public administration of justice is delegated.

(2) The presence of a sufficient number of the members of such a body regularly convened in an authorised place at an appointed time engaged in full and regular performance of its functions.

(3) The place where justice is judicially administered.

(4) The judge or judges themselves, when duly convened.

The word 'Court' in Section 476 of the Criminal Procedure Code evidently means a Judge or body of Judges to whom the Public administration of justice as regards any particular subject or subjects has been delegated by the government. The Divisional Officer has been empowered by government to do justice between itself and payer of an income-tax on the question as to the extent of his liability to pay such tax and I am therefore clear that he is a Revenue Court. The question who or what is a court within the meaning of particular enactments is frequently a very difficult question and even the highest tribunals seem to be loth to give any definition which would be comprehensive and exhaustive. For instance in *Hiranand Ojha* v. *The Emperor*[1], their Lordships did not think it necessary to express any opinion whether a Sub-Deputy Collector who was empowered under the Bengal Land Registration Act of

1. (1905) 9 C. W. N. 983.

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1876 to inquire into claims for registration of landed estate and who had powers to compel witnesses to give evidence before him was or was not a court. In re *Maharajah Madhava Singh*[1] the commissioners who were appointed bythe GovernorGeneral to inquire into the truth of a charge against the Maharaja of Panna that he had instigated the death of his uncle and who had convicted the Maharaja of such offence were held by their Lordships of the Privy Council not to come within the meaning of the term 'Court' because the commission was appointed merely to advise the Governor-General in Council. But it appears from the short judgment of Lord Davey in that case their Lordships added that even if the commission in question was a Court, it was not a Court from which an appeal lay to His Majesty in Council. The expression, Civil Criminal or Revenue Court' in section 476 of the Criminal Procedure Code cannot of course include a private Court of arbitration or Commissioners who are merely empowered to take evidence, but it must include a tribunal like the Court of a District Munsif which has ordinarily power to give decisions as to rights of parties coming before it though in particular cases as for example, where another Court has sent a commission to the District Munsif merely to take evidence or where an Appellate Court directs it to take evidence and send the evidence so taken to the Appellate Court, it may not be able to give any decision on the evidence taken before it as a Court. Again, it is conceivable that there may be constituted appellate Courts which can only decide upon evidence taken by inferior Courts. They may not themselves be empowered to take evidence and yet they will come under the definition of Courts. I am therefore of opinion that the test for deciding whether a particular officer is a Court does not depend upon whether he is empowered to take evidence but whether he has been given jurisdiction by the constituted authorities to deal out justice in any particular defined class of cases. In the case of *Naloo Patra* v. *Emperor*[2] the learned Judges also lay stress on the fact that the Tashildar holding an enquiry as to transfer of names in a land register was a tribunal empowered to deal with a particular matter and to consider all the evidence in order to enable him to arrive at a determination on that matter. Applying this test, the Revenue Divisional Officer in this case was clearly a Revenue Court. Coming to the next question whether the petitioner had any other remedy against the order of the Divisional Officer who purported to act under Section 476 of the Criminal Procedure Code, I agree with my

1. (1904) I. L. R. 32 C. 1. 2. (1900) I. L. R. 24 M. 121.

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learned brother that the petitioner had none. As regards the next question as to whether the revenue officer's order was without jurisdiction because it was passed long after the close of the income-tax proceedings, I think I am bound by the Full Bench Case of *Aiyakannu Pillai* v. *Emperor*[1] though, if I may say so with respect, the reasoning in the dissentient Judgments of Miller J. both in *Rahimadulla Sahib* v. *Emperor*[2] and *Aiyakannu Pillai* v. *Emperor*[1] have appealed more to my mind, as they have evidently appealed to the minds of Benson and Munro JJ. in the case of *Ramiya Naik*[3] and to the minds of the Judges who decided *In re Lakshmidos Lalji.*[4] I think that till the legislature makes the point clear by amending the code I must follow *Aiyakannu Pillai* v. *Emperor.*[1] On the fifth question whether his is a fit case for the exercise of our discretion to grant a writ of *certiorari*, assuming that we have jurisdiction to do so, the petitioner can take all objections as to the alleged illegality of the Divisional Officer's action under section 476 before the Criminal Court which is trying him for the offence of perjury and I am not inclined to encourage technical objections which are merely intended to prevent the Courts from going into the merits of the question whether the petitioner did or did not commit perjury in the statements he gave before the Revenue Court. The only question remaining for disposal which I have reserved till the end as one of great difficulty is whether the High Court has got power to issue a writ of *certiorari* on an officer performing judicial duties in the Mofussal. The statutes on this point have been referred to in the Judgment of my learned brother and I do not intend to refer to all of them. That the High Court has inherited all the powers of the Supreme Court seems to be clear law. The Letters Patent of Supreme Court clause 8, clearly says that the Chief Justice and the Puisne Judges have such jurisdiction and authority as "Our justices to the King's Bench have and may lawfully exercise" within England, the jurisdiction of the Supreme Court to extend for this purpose throughout the settlement of Fort Saint George and the town of Madras *and all the territories which now are or hereafter may be subject to or dependent* upon the Government of Madras. That the Court of King's Bench had the power to issue writs of *certiorari* over the whole of England cannot be denied. The Chief Justice and Judges of the High Court have therefore, in my opinion clearly jurisdiction over the whole Madras Presidency to issue writs of *certiorari.* The Court of King's Bench had similarly power to issue writs of *Habeas*

1. (1908) I. L. R. 32 M. 49.
2. (1908) I. L. R. 31 M. 140.
3. Crl. M. P. 207 of 1907.
4. (1907) I. L. R. 32 B. 184.

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Corpus over the whole of England and Mr. Justice Norman in *In the matter of Amir Khan*[1] expressly bases the power of the High Court of Calcutta to issue writs of *Habeas Corpus* throughout Bengal even to persons in the Mofussal on the ground that the High Court of Calcutta inherited all the powers of the Supreme Court of Calcutta under its Letters Patent which contained a similar provision to clause 8 of the Letters Patent of the Madras Supreme Court, had all the powers of the King's Bench in England over the whole of Bengal. Both writs are high prerogative writs vested in the Court of King's Bench as representing the powers of the Crown to do justice in extraordinary cases and I see no reason to restrict the power to issue such writs of *certiorari* to persons within the Original, Civil and Criminal jurisdiction of the Madras High Court if (as must be conceded) the writ of *Habeas Corpus* can issue to the Mofussal also. I am unable to agree that the clause 8 of the Letters Patent gave the powers it gives to the Chief Justice and the Puisne Judges in their individual capacity and that it was not intended to give them powers as constituting the Supreme Court. The Statute 39 and 40 George III, page 79, was intended to establish a Supreme Court of Judicature at Madras to consist of the like number of persons, etc., as the Supreme Court at Fort William and the Letters Patent were issued in order to establish the said Supreme Court of Judicature to consist of the Chief Justice and the Pusine Judges. The said Chief Justice and Puisne Judges were empowered to make rules for forming Courts made up of individual Judges or Bench of Judges as the case may be to hear particular matters within the jurisdiction of the Supreme Court. The writ of *Habeas Corpus* when it is issued by a single Judge or a Bench of Judges is issued because the Judge or Judges form the Court for that particular matter and I am therefore clear that the writ of *certiorari* cannot be put on a different footing from the writ of *Habeas Corpus*; and if the writ of *Habeas Corpus* can issue to the Mofussal by the powers vested in the Supreme Court (and inherited by the High Court) under clause 8 of the Supreme Court Letters Patent, the writ of *certiorari* can also run in the Mofussal under the same powers. The power of King's Bench to issue writs of *Habeas Corpus* and *certiorari* were not given by any Statute for the first time but belonged to them as representing the high prerogative powers of the King. The *Habeas Corpus* Act, 31 Charles II Chapter 2 did not create the power in the Court of the King's Bench for the first time and as Norman, J., remarked during the course of the argument in *Amirkhan's*[1] case, the Statute assumes the power of the Judges to issue writs of

1. (1871) 6 B. L. R. 392.

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Habeas Corpus at common law. The Court of King's Bench at Westminster had power to issue writs of *Habeas Corpus* to all parts of Her Majesty's dominions even to those parts in which there were independent legislatures as was done in the case of *Henry Anderson*[1] where a *Habeas Corpus* was issued to Canada. In the year 1862, that power was qualified by 25 and 26 Victoria Chapter 20 which enacts that no writ of *Habeas Corpus* shall issue out of England into any colony or foreign dominion *where Her Majesty had a lawfully established Court of Justice having authority to grant and issue the said writ and to ensure the due execution thereof throughout such colony or dominion.* Now the Charter Act and the Letters Patent of 1800 gave to the Supreme Court throughout the territories subject to the Madras Government all the powers of the King's Bench which the King's Bench could exercise throughout England and it seems to me clear that those powers included the jurisdiction to issue writs of *Habeas Corpus, certiorari,* and others. Prerogative writs like *Habeas Corpus, certiorari* prohibition and mandamus belong to Superior Courts as representing the King's Majesty who "For the pleasure of God and the quietness of our subjects, to save our conscience and to keep our oath" has commanded "our Justices" to hold these powers. The writ of *certiorari* includes several kinds of writs *viz., certiorari* to remove for trial *certiorari* for judgment on indictment, *certiorari* to quash commitment: *certiorari* for the purpose of execution or coercive process, *certiorari* to remove orders etc., on cases stated, *certiorari* to remove depositions for bail, and *certiorari* to remove record for use as evidence. But in this case we are only concerned with the third kind, *viz., certiorari* to quash. The Supreme Court was established as a Court of Judicature for the whole Presidency and all the dominions which may come under the Government of Madras. I agree with Norman, J., that while as regards Original, Civil and Criminal jurisdiction, the Letters Patent confined the jurisdiction of the Supreme Court to the Presidency Town the powers of the Supreme Court as a Court of Judicature for the whole of the Presidency of Madras extend to the issuing of writs of *Habeas Corpus* and like prerogative writs into the Mofussal also, provided that they are not issued so as to affect Courts. The fixing of the Civil, Criminal and other jurisdiction of the Supreme Court and inhabitants who do not owe undivided allegiance to the British Crown by clauses 21, 22, 33, 34 of the Letters Patent cannot in my opinion, limit the powers given by clause 8. I think that the power to issue these high prerogative writs in the Indian dominions of His Majesty

1. (1861) 3 El. and El. 487.

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must *inhere* in some Courts of record and clause 8 of the Letters Patent for Madras and clause 4 of the Letters Patent for Bengal and similar clauses in the Letters Patent of the other High Courts must have been intended to give such powers to the High Courts in India, the King's Bench in England being deprived of the power to issue writ of *Habeas Corpus* in the dominious of India by 25 and 26 Victoria Chap. 20 when the Supreme Courts were established in the Indian dominions. As said in *Peacock* v. *Bell*[1] nothing shall be intended to be out of the jurisdiction of the Superior Court except that which especially appears to be so. If the right to issue writs of *certiorari* to the mofussal in appropriate cases did not reside in the Supreme Court at Madras and does not reside now in the High Court, where else did and does it reside? The right to quash proceedings of judicial bodies was intended to meet cases where irremediable injustice might ensue to the subjects of His Majesty and if such a power does not exist in the High Court, the King would be unable to exercise his prerogative to prevent such injustice. I am aware as Innes, J. remarked in *Jamuna Bai* v. *Sadagopa*[2] that the exact jurisdiction conferred by the Charter of the Supreme Court has always been regarded as very obscure but in that case, *Jamuna Bai* v. *Sadagopa*[2] their Lordships did accept the argument of the Advocate-General that the jurisdiction of the Supreme Court was not merely territorial and they allowed property situate in Chingleput to be sold in execution of a decree passed by the Madras High Court on its Original side. Innes, J. makes no reference to clause 8 of the Letters Patent of the Supreme Court, simply because it was not necessary to consider that clause at all for the purposes of that case and I am unable to find any observation in that judgment which shows that the learned Judge must have held that clause 8 to which, as I have already said, he makes no reference, conferred no power to issue writs of *Habeas Corpus* or *certiorari* directed to judicial bodies within the territories subject to the Government of Madras. The case of *Raja of Ramnad* v. *Seetharama Chetty*[3] depended upon the provisions of the Letters Patent of 1865 which expressly enacted that the ordinary Original Civil and Criminal jurisdiction of the said High Court of Madras shall not extend beyond the limits for the time being declared and prescribed the local limits of such jurisdiction and it had nothing to do with the right of the High Court as inheriting the powers which the Supreme Court had under clause 8 of its Letters Patent. We are considering this question not in the ordinary Original Civil side of the High Court and hence the restriction placed

1. (1679) 1 Williams Saunders 74. 2. (1883) I. L. R. 7 M. 56 at 58.
3. (1902) I. L. R. 26 M. 120.

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upon the Original Side of the High Court by the Letters Patent of 1865 and the rules framed by the High Court under the Letters Patent relating to transfer of Original Side decrees for execution have no bearing upon the consideration of the question before us. The cases of *In the matter of James Pattle*[1] and *In re. Samuel Valentine Foy*[2] all depend upon the question whether the Supreme Court had any kind of jurisdiction over the Courts established by the East India Company in the mofussal and the officers of the Company's Courts, the powers of the East India Company being regulated by their own special statutes and charters which gave them power to establish court in the Mofussal as regards the company's subjects who were not even considered as British subjects owing direct allegiance to the Crown. British Laws did not run in the Company's mofussal territory. The Company obtained varying rights over scattered factories from various Native Princes and the Company's courts countenanced slavery and the Company's native subjects in the mofussal were not even British Subjects. Till direct allegiance to the Crown was established and the mofussal courts became the Courts of the Crown just like the High Court instead of having been the courts of the East India Company, the Supreme Court had clearly no right to issue writs of *certiorari* in respect of mofussal courts which were practically foreign Courts and over the officers of the mofussal courts carrying out the orders of such courts and that is the main ground on which those old cases were decided; clause 23 of the Letters Patent barring the Supreme Court's jurisdiction over courts—the Company's Courts. As was said by Sir Elijah Impey in the Patna case in 1777, "In this country, the gross body of the people are not and only certain persons answering particular descriptions are objects of the King's Laws and of the jurisdiction of this Court" that is, the Supreme Court. But when all the people became subject to the King's Laws and the King's courts instead of the Company's laws and Company's Courts, they must be entitled to invoke the King's prerogative vested in the Superior Courts for their protection.

In the result and after much anxious consideration, I have come to the conclusion that the power to issue the writ of *certiorari* to quash judicial proceedings passed by persons in the mofussal does belong to the High Court though of course the power should not be invoked except in very extraordinary cases I can well conceive of cases in which proceedings in the nature of judicial proceedings might be passed by an officer and these proceedings might be postponed by him to take effect at a future time when the person to be affected

1. (1836) 1 Ind. Decisions old S. 828. 2. (1850) 2 Ind. Decisions 396.

by such order may have to be absent from British India and could not therefore then take steps to prevent the execution of that order. In such a state of facts it might be necessary in the interests of justice to remove such order by a writ of "certiorari to quash" to the High Court and have it quashed to prevent irremediable injustice.

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As I agree with my learned brother on all the questions arising in this case except this rather academic though important question as to the powers of the High Court to issue writ of *certiorari* to quash and as the decision on the other four questions leads to the same conclusion as that which my learned brother has arrived at, I agree that this petition (320 of 1911) also like the petition No. 509 of 1911 should be dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar, and Mr. Justice Sadasiva Aiyar.

R. P. Konetti Naiker, and others ... ... **Appellants.* (*Defendants Nos.* 3, 4 *and* 5).

v

Jutu Gopalaiyar ... *Respondents.* *Plaintiffs.*

Konetti Naiker *v.* Gopalaiyar.

Negotiable Instruments Act S. 28—Agent's liability—Construction—No signature as agent—Effect of—English and Indian Law—Pleadings—Construction.

Plaintiff brought a suit on a pro-note executed by 3rd defendant acting as agent of defendants 1 and 2 for goods supplied to defendants 1 and 2. Defendants 1 and 2 were sought to be personally made liable and the 3rd defendant was sought to be made liable only in case defendants 1 and 2 were exonerated. The note was executed by 3rd defendant without indicating in the signature that he signed the note "as agent" and without expressly stating in the recitals that he did not intend to make himself personally liable. But there were recitals in the note indicating the purpose for which the loan was contracted to have been in respect of goods supplied for defendants 1 and 2 and the 3rd defendant was described in the body of the note as one holding a power of attorney from defendants 1 and 2. At the hearing in the first court an additional issue was framed regarding the liability of the 3rd defendent as maker of the note in his own name.

Held per *Sundara Aiyar* J. (*Sadasiva Aiyar* J. dissenting).

That the suit should not have been, by the framing of the additional issue, converted in the face of the allegations in the plaint into a suit on a negotiable instrument against the 3rd defendant as maker of the note.

Obiter:—An agent to free himself from liability as maker of a note must either indicate on the note that he signs as agent or he must indicate on the note that he does not intend thereby to incur personal responsibility.

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* S. A. No. 103 of 1911. 30th August 1912.

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Held also that the 3rd defendant had indicated on the note that he was not to be personally liable.

The difference between the English and the Indian Law and the rules of construction in each indicated.

Per *Sadasiva Aiyar* J.—The court was right in framing the additional issue; the honest narrative given by the plaintiffs in their plaint as to the circumstances which led to the execution of the pronote or the ignorance of the plaintiffs or of the 3rd defendant as to their mutual rights and liabilities under Exhibit A cannot deprive plaintiffs of their legal rights or exonerate the 3rd defendant from his legal liabilities.

An agent who signs a negotiable instrument without indicating in the signature that he signs as agent and without expressly stating in the preliminary recitals in the body of the note that he did not intend to make himself personally liable cannot escape liability under the note, by the fact ot his having described himself as agent in the body of the note and the note itself containing a recital that the debt was incurred by the principal.

Second appeal from the decree of the District Court of Madura in Appeal Suit No. 150 of 1910, presented against the decree of the Court of the Principal District Munsif of Madura in Original Suit No. 457 of 1908.

S. Gopalaswami Aiyangar for appellants.

B. Sitaramao Rao for respondents.

S. Gopalasami Aiyangar submitted that on the face of the promissory note, it must be taken that the pronote was signed by the executant as agent. He referred to the judgment of the court of appeal in *Chapman* v. *Smethyrst*[1] as reversing the judgment of Channel J. on which reliance was placed in the Lower Court. Parol evidence was admissible, he submitted, to show that the signature was by the agent as such. He relied upon *Sesha Aiyar* v. *Mangal Doss Jee*,[2] *Gopalarao* v. *Veerappen*,[3] *Kutte Ammu* v. *Purushottam Doss*,[4] *Muthar Sahib Marakayar* v. *Kadir Sahib Marakayar*.[5]

B. Sitarama Rao for respondent submitted that *Chapman* v. *Smethyrst*[1] proceeded upon the view that the signature to the note was by the company, the secretary's signature was there only to indicate as to who put the seal. The case turned also on the construction of sec. 49 of the Companies Act; see Byles on Bills p. 92. Any how, in that case, the secretary signed himself "secretary" whereas here, the agent signs himself by name. As to the English Law, see Byles on Bills p. 55 and 56, Chalmers on Bills p. 87 *Dutton* v. *Marsh*,[6] *Leadbetter* v. *Farrow*.[7] As to the American Law Daniel Vol. I, p. 299. Law Merchant is one department of law where uniformity is desirable. English Law on this point does not differ from the

1. (1909) 1 K. B. 729.
2. (1909) 20 M. L. J. 144.
3. (1911) 22 M. L. J. 121.
4. (1910) 21 M. L. J. 526.
5. (1905) I. L. R. 28 M. 544.
6. (1871) L. R. 6 Q. B. 361.
7. (1816) 5 M. & S. 349.

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Indian; see Chalmer's opinion in his commentaries on Sec. 28 of the Indian Act; see Halsbury Vol. I, p. 221, Vol. II p. 495. The section requires that the signature must appear on the face of the document to be "as agent." On the clear words of the section, no question as to the admissibility of parol evidence can arise. Under the English Law, parol evidence is not admissible; see *Chapman* v. *Smethyrst.*[1] For the Indian Law, see *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*[2], *Sesha Aiyar* v. *Mangal Doss Jee*[3] is a case of defence of no consideration; *Kutte Ammu* v. *Purushottam Doss*[4] is a case of mistake; *Gopalrao* v. *Veerappen*[5]; is a case of promisee see the judgment of Mr. Justice *Krishnaswamy Aiyar* in C.R.P. of 1910. He referred to the necessity for freedom from ambiguity in negotiable instruments. *Cur ad vult.*

The Court delivered the following

Judgment :—*Sundara Aiyar* J. In this case the plaintiffs instituted a suit against the defendants to recover a debt due to them. The plaint alleged that the plaintiffs, who were dealers in cloths and other things, supplied cloths to the mother of the 1st defendant for the benefit and use of the 1st and second defendants who were then minors; that the 1st defendant executed, after attaining majority, a power of attorney, in favour of the 3rd defendant; and that the latter acting under the power of attorney executed a pro-note to the plaintiffs for Rs. 694-6-0, the price of the goods supplied by them. Paragraph 4 of the plaint alleged that the 2nd defendant was also liable, as the debt was incurred for the common expenditure of the joint family of the 1st and 2nd defendants; and, if the Court should be of opinion that for any reason the 1st and 2nd defendants were not liable, the 3rd to 5th defendants must be made liable, the 4th and 5th defendants being the sons of the 3rd defendant.

The 1st defendant pleaded that the purchase of the cloth was not for the benefit of the family, that the power of attorney was not acted on and that the 3rd defendant had no power to execute the pro-note under the power of attorney. The 2nd defendant repudiated liability and contended that the power of attorney executed by the 1st defendant was not valid and was not binding on him. The 3rd defendant denied personal liability on the ground that the note was executed by him as agent under the power of attorney executed by the 1st defendant.

The issues raised the question of the 3rd defendant's liability for the amount due under the note. Issues were also raised to try the

1. (1909) 1 K. B. 729.
2. (1906) I. L. R. 30 M. 88 (F. B.)
3. (1909) 20 M. L. J. 144.
4. (1911) 22 M. L. J. 121.

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question of his power to execute the note and of its validity as against the 1st and 2nd defendants.

Now according to the plaintiffs, the suit as against the 3rd defendant was not framed on the ground that he was liable as the maker of a negotiable instrument. It was admitted that he acted as the agent of the 1st defendant; and that the cloths were purchased for the use of the 1st and 2nd defendants. Relief appears to have been claimed against him on the footing that he would be personally liable for executing the note as agent if he had no authority to do so. At the trial of the suit, it was contended that the 3rd defendant was personally liable as the executant of a negotiable instrument and an additional issue was framed to raise this new question. The District Munsif held that he was personally liable and passed a decree against defendants Nos. 3 to 5; the 4th and 5th defendants were also held liable to the extent of the joint family property in their hands. Defendants Nos. 3 to 5 appealed to the District Court against the Munsif's decision. The District Judge agreed with the Munsif and held that the suit was rightly dismissed against the 1st and 2nd defendants. It was represented to us that at the hearing of the appeal the plaintiffs applied that the 1st and 2nd defendants should also be made parties to the appeal in order that a decree might be passed against them if the 3rd defendant was held to be not liable. As the District Judge agreed with the Munsif on the question of the 3rd defendant's liability, the 1st and 2nd defendants were not made parties. Defendants Nos. 3 to 5 have preferred this second appeal; and the question raised for decision is whether the judgment holding the 3rd defendant personally liable for the debt is correct in law. I cannot but think that the District Munsif ought not to have allowed the plaintiffs at the trial to set up a case which was in reality entirely different from that which they put forward in their plaint. They admitted there that they dealt with the 3rd defendant as the agent of the 1st defendant, and that their right to recover the money was primarily against the 1st and 2nd defendents. They sought to make the 3rd defendant liable in case the 1st and 2nd defendants were exonerated. In consequence of the procedure adopted by the Munsif, no witnesses were examined for either the plaintiffs or the defendants. The suit was allowed to be converted into one on a negotiable instrument against the 3rd defendant as the executant, and the liability of the first and 2nd defendants for the debt was really not tried at all. I am of opinion that this course ought not to have been permitted having regard to the allegations in the plaint. The plaintiffs did not allege that they were mistaken in making those

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the High Court of Bombay.]

Present:—Lord Shaw, Sir John Edge, Mr. Ameer Ali.

Shrimant Raja Bahadur Raghoji Rao ... *Appellant.**

v.

Shrimant Raja Lakshman Rao Sahib ... *Respondent.*

Raghoji Rao v. Lakshman Rao Sahib.

Grant—Construction—Evidence contemporanea expositio—Inam—Saranjam—Impartibility—Jaghir—Incidents of grant.

Contemporanea expositio as a guide to the interpretation of documents is often accompanied with danger; and great care must be taken in its application. When the admitted ambiguity in a grant covers the geographical and pecuniary extent, it is legitimate to a court to observe the footing upon which the grantors, namely, the Government and its successors and officials proceeded from the date of the grant for a long time.

A grant in Jaghir of the ordinary character is no grant of the soil but a personal grant only of the revenue. It is personal and not hereditary and is resumable at pleasure and "necessarily, impartible" and a custom of succession by primogeniture would be radically inconsistent with the personal and non-transmissive character of a grant in Jaghir and consequently not subject of proof.

The words "saranjam" and "inam" are not mutually exclusive. The term "inam" is one of more generic significance applicable to a Government grant as a whole.

The question in the case was about the significance of the words "lands attached to Deur" a term used in the grant in the case as to whether they included the lands belonging to the grantee in the Satara District by yielding an annual income of Rs. 3.000 or whether it covered all the properties in the Bombay Presidency yielding a revenue of Rs 12,000 per year.

Held:—That the words "lands attached to Deur" included lands in the Presidency of Bombay which were attached as an appanage to the title of the Rajah of Deur.

Appeal from a judgment and decree of the Bombay High Court which affirmed the decree of the First class Subordinate Judge of Poona.

Kenworthy Brown, Lowndes aud *Dick* for appellant.

L. DeGreuyther, K. C., Ross and *Gidgil* for the respondent.

Their Lordships' judgment was delivered by

Lord Shaw:—This appeal is made against a decree of the High Court of Juticature at Bombay, dated the 14th November 1907, which affirmed a decree of the Subordinate Court of Poona, dated the 7th December 1904. The plaintiff (respondent) and the defendant (appellant) are brothers. The main object of the suit is contained in the first prayer of the plaint, and to have it declared

* 18th July 1912.

ghoji Rao v. akshman ao Sahib.

that the whole of immoveable and moveable estate mentioned in the schedule annexed to the plaint belongs to these two brothers as equal owners thereof. The elder brother, the Defendant Appellant, is Rajah of Deur. And the claim is resisted by him upon the ground that the various properties referred to had been succeeded to by him, under the law of primogeniture, as an appanage to the title of Rajah conferred upon him by a *sanad* issued under the hand of the Governor-General, Earl Canning, in the year 1862.

The properties are situated in the Districts Poona, Ahmednagar, Satara and Sholapur, all in the presidency of Bombay. They include five *mouzahs* or villages, together with various *vatans*, *haqs*, and cash allowances, set forth in the schedule. It was matter of agreement in the High Court that the main question in the case should be treated as one applicable to the villages or *mouzahs* and that when the question of partibility or impartibility should be settled in regard to them, the remaining items in the schedule should follow that decision.

Of the *mouzahs* mentioned, that of Deur is situated in Satara. In the course of the proceedings it has been admitted that the property in the Satara District is an appanage of the title of the Rajah of Deur, is impartible, and is succeeded to along with the title and position of Rajah accordingly, that is to say, by the rule of primogeniture. It is submitted by the appellant that the the same result should have followed with regard to the rest of the porperties in dispute. The question in the case is whether that submission is correct.

The whole of the properties are, as stated within the Bombay Presidency. This fact throws light upon the construction of many of the official minutes, despatches, entries and others, referred to in the case, and appears to be one of cogency. It can hardly be denied that the language used in all these official documents for a period of about fifty years is at least *ex-facie* language applicable to the possessions of the Rajah in the Bombay presidency as a whole.

Points of great historical interest are naturally suggested by a review of the pedigree put in by the parties. The records of the Bhonsle family—the Rajahs of Nagpur—are bound up during a long period of time with many stirring adventures and achievements in the course of the Mahratta ascendency and its decline. The position of the family was one of great note from the middle of the 17th, and during the whole course of the 18th, and first half of of the 19th, centuries. The possessions of these Rajahs were extensive, stretching throughout many portions of the Central Provinces,

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allegations. They should not have been permitted to throw entirely on the 3rd defendant a liability which they themselves admitted really lay on defendants Nos. 1 and 2. I would therefore reverse the decrees of both Courts on this ground, strike out the additional issue framed by the District Munsif and remand the suit to the Munsif's Court for fresh disposal according to law on the issue originally framed.

As the question of the liability of the 3rd defendant as the maker of the note was fully discussed at the hearing, I consider it desirable that I should make a few observations as to the state of the law on the point. Section 28 of the Negotiable Instruments Act enacts that "an agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable." According to the language of the section, a person who executes a promissory note as an agent, would be personally liable, unless he does one of two things: he must either indicate 'thereon' (that is on the note) that he signs as agent or he must indicate on the note that he does not intend thereby to incur personal responsibility. An indication of either of the two things will do. Now, has the 3rd defendant done so in this case? The note is executed by Konetti Naidu, that is the 3rd defendant, "holding power of attorney from the Zemindar Durai Raja Avergal" (that is the 1st defendant). Then the consideration for the note is set out. "Amount due to you including principal and interest up-to-date upon settlement of account of dealings which was standing against the name of Rani Chakkani Ammal on cloths, etc., having been purchased ere this for the Vellikurichi palace is Rs. 694-6-0." Now the debt is said to have been incurred by the 1st defendant's mother and for the Vellikurichi palace, that is, the palace of the 1st defendant. It is contended that it was not stated who Chakkani Ammal was. That is entirely unnecessary. The plaintiffs well knew who she was and they well knew that the Vellikurichi palace was the palace of the 1st defendant. Then follow the words of promise: "I promise to pay this sum of rupees six hundred and ninety-four and annas six." The question is, has or has not the 3rd defendant indicated on the note that he does not intend to incur personal responsibility for the debt? He has described himself as the agent of the 1st defendant holding a power of attorney from him. He has described the debt as one

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binding on the 1st defendant and incurred by the 1st defendant's mother. In instruments executed by the people of this country, it is, in my opinion, very uncommon for the executant to describe himself as agent of another, unless the contract is entered into by him as an agent. In this case, the justification for his acting as an agent is also referred to, namely, that he holds a power of attorney from the 1st defendant. The question whether the 3rd defendant executed the document as agent and whether he has indicated that he did not intend to be personally responsible for the amount of the note is one of construction. In construing the instrument, I think it is proper and necessary to put oneself in the position of the executant and to take into consideration the habits of the poeple of this country in the matter of conveyancing. These habits may not be the same as those of people in England or elsewhere, and the construction to be put on an instrument executed by a Hindu here should not necessarily be made to depend on the construction of a similarly worded instrument executed by an Englishman. It is contended that decisions under section 28 of the Negotiable Instruments Act should follow the English decisions which have placed a construction on similar instruments in England and on section 26 of the Bills of Exchange Act, 45 and 46. Vic. C. 61. Now this (section 26) runs as follows :—

(1) "Where a person signs a bill as drawer, indorser or acceptor and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon: but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted." In my opinion, these words are materially different from the language of Sec. 28 of the Indian Negotiable Instruments Act. According to the English Act, words should be added *to the signature* indicating that the executant signs for or on behalf of a principal; but the Indian Act does not require this but only an indication, not in the signature but anywhere on the note, that the executant signs as agent. Then an alternative requirement is regarded as sufficient by the Indian Act. It is enough if it is indicated in the note that the executant does not intend to incur personal responsibility. I do not see any reason for not giving to the words of section 28 their plain and ordinary meaning. I do not think it is justifiable to require in

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India that there should be words added to the signature to show that it is that of the principal and not that of the man who puts his hand to it. In my opinion, construing the instrument in the light of my experience as to the habits of the people of this Presidency in conveyancing, the 3rd defendant has indicated in the promissory note both that he signed it as agent and that he did not intend to incur any personal liability on it. In C. R. P. No. 816 of 1909, 12 Indian Cases, page 421 a note was executed in favour of one Chellappa Chettiar described as the agent of another person. The payee endorsed it in favour of another and described himself merely as Chellappa Chetty without any words indicating that he made the endorsement as agent. It was not contended that he made the endorsement as agent. But it was argued that the note must be taken to have been executed in his own favour personally and that the endorsement by him personally was sufficient to transfer the note to the indorsee who instituted a suit upon it. The judgment in that case to which I was a party held that *prima facie* the note must be taken to have been executed to Chellappa Chetty in his character as agent and that he was not the beneficial owner of it. The respondent relies on a judgment of Krishnaswami Aiyar J., in *Aiyathurai Iyer* v. *Dharmasiva Iyer.*[1] There the executant of the note was described in the body of the note as an honorary manager. The signature to it was not made as the agent of anybody. The learned Judge held that there was no indication that the executant did not intend to make himself personally liable. It was found that he had no authority to make the note so as to bind either the principal, who was a trustee of a temple or the temple itself. On these facts the executant would be clearly liable, as he purported to act as agent when he had no authority to do so. The decision, however, proceeded apparently on the construction of section 28 of the Negotiable Instruments Act. The learned Judge held that "the description of the first defendant in the body of the pro-note as honorary manager is not an indication on the face of the pro-note that he does not make himself liable." I should myself think that the description of the executant as honorary manager would be an indication that he was not to be personally liable. Of course an agent might contract to be personally liable, and it would be open to the payee to prove such an agreement. But apart from such agreement, I think that in this country the description itself should be taken to be an indication that the executant should not be personally liable. The decision in the particular case as to the liability of the executant for the debt was obviously right, though,

1. (1911) 1 M. W. N., 143.

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in my opinion, the learned Judge did not attach sufficient weight to the import of the description of the maker as the agent of the trustee of the temple.

Having regard to the language of section 26 of the English Act, I think the English decisions cited at the hearing are hardly in point. In *Chapman* v. *Smethurst*, [1] the promissory note was signed by the managing director of a Company thus:—"J. H. Smethurst's Laundry and Dye Works Limited, J. M. Smethurst, Managing Director." The maker was held to be personally liable. Channel J., held, referring to the earlier cases on the point, that the note was not signed by the maker as an agent of the Company. His attention was directed to the fact that the name of the Company and the words 'managing director' were put on the document by means of a stamp. But he observed. "I must look at the document as a whole, and so looking at it, I must give to the stamped words the same effect as if they had been written. * * It is not sufficient for the party signing to describe himself as agent; he must show that he signs as agent and contracts as agent." I believe the learned Judge meant that there must be words in the signature showing that it was made as agent. But section 28 of the Indian Act, as already stated, does not require this. Great importance was attached by the learned Judge to the use of the word "I." The decision of Channell J., was reversed on appeal, see *Chapman* v. *Smethurst*[1] the court of appeal being of opinion that the note was practically the note of the Company. In *Alexander* v. *Sizer*,[2] a less strict view was taken, Kelly, C. B. observed: "Now, looking at the terms of the note itself, it seems to me that it does not, on its face purport to be a personal contract. If it had been so, and had been made on some consideration moving towards him personally, it would have been signed, "John Sizer," and no more. But we find that although in the body of it the personal pronoun 'I' is used, it is signed 'John Sizer, Secretary' for the Company. Unless intended to be the Company's note and not his own it is difficult to see why it was signed as 'Secretary' at all or why the Company's name was introduced into it. I have no doubt it was signed by the defendant only as Secretary, and was intended as the note of the Company." He distinguished *Leadbitter* v. *Farrow*[3] as being a case in which the indication was merely to the effect that the debt was to be placed to a particular account, which did not therefore show that the executant was not to be liable personally. As stated by Channell, J, the question is one to be decided by inter-

1. (1909) I K. B. 73; 927 C. A. 2. (1869) L. R. 4 Ex. 102.
3. (1816) 5 M and S. 345.

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preting the instrument taken as a whole. And in this country importance is not to be attached solely to the way in which the signature is made. I consider it unnecessary to refer to one or two other English decisions that were relied on at the hearing. There is no doubt that the view taken in English cases is stricter than would be warranted by the language of section 28. The English view is embodied in section 26 of the English Act which undoubtedly throws a heavier responsibility on a person who wishes not to make himself personally liable on a pro-note. The governing principle is laid down in *Halsbury's Laws of England*, Vol. I paragraph 463, pp. 219 and 220. "*Prima facie* a party is personally liable on a contract if he puts his unqualified signature to it. In order, therefore, to exonerate the agent from liability, the contract must show, when construed as a whole, that he contracted as agent only, and did not undertake any personal liability. It is not sufficient that he should have described himself in the contract as an agent whether as part of his signature or otherwise. But if he states in the contract, or indicates by an addition to his signature that he is contracting as agent only on behalf of a principal, he is not liable, unless the rest of the contract clearly involves his personal liability, or unless he is shown to be the real principal." Mr. Sitarama Rao referred to paragraphs 289 and 290 page 301 of Volume 1 of Daniel's Negotiable Instruments; but I do not think they carry the case any further. He also relied on *Subbanarayana Vathiyar* v. *Ramaswami Aiyer*[1] but all that was decided in that case was that payee of a negotiable instrument was entitled to sue on it even though he was only a benamidar for the person really intended to be the payee. I do not think that that case is an authority which helps the respondent in this case. Section 27 of the Indian Act provides that " every person capable of binding himself or of being bound as mentioned in Section 26 may so bind himself or be bound by a duly authorized agent acting in his name." The section does not require that the agent should *sign* in his name. It is enough if the instrument shows that the agent acts for him, even if it be held that evidence *de hors* the instrument is not admissible to prove the fact. In *Sesha Aiyar* v. *Mangal Dossjee.*[2] Munro and Abdur Rahim JJ., held that the maker of a promissory note could plead and prove that he executed it merely as a benamidar for another and that no consideration flowed in his favour from the payee. The note had not been negotiated. If it is open to the maker to prove that he was only a benamidar for a third person, I see no reason why he should not be entitled to show that he was only an agent for another. But

1. (1906) I. L. R. 30 M. 88.

2. (1910) 20 M. L. J. 144.

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perhaps section 28 will not allow going so far, because it provides that the note itself must indicate that the executant acted only as the agent of another in making it. I am prepared to hold that in this case the note indicates that the 3rd defendant was not to be personally liable for the amount. But as already stated the question does not arise here as the plaintiffs admitted in the plaint that the 3rd defendant was not liable as the maker of a negotiable instrument, and that he acted only as the agent of the 1st defendant. The plaintiffs are themselves the payees under the note and do not claim any rights as holders in due course who were misled by the words of the instrument. I would reverse the decree against the 3rd defendant as the maker of a negotiable instrument. The suit must be remanded to the Munsif in order that it may be tried on the other issues. The respondents must pay the appellants' costs.

Sadasiva Aiyar, J :—The short question in this appeal is whether 3rd defendant who signed the negotiable pro-note Exhibit A without indicating in the signature that he signed as agent and without expressly stating in the preliminary recitals in the body of the note that he did not intend to make himself personally liable can escape liability to the holders of the note by contending that as he described himself in the beginning of the note as agent of 1st defendant and as the debt for which the pro-note was executed is recited to have been incurred by a lady whom the holders know to be 1st defendant's mother, he is not legally liable on the pro-note.

It has been held in the Full Bench case in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* [1] that "before the passing of the" (Negotiable Instruments) " Act, negotiable instruments were governed in this country as in England by the law merchant, and as stated in Leake on Contracts (4th Edition, page 337) " according to the Law merchant, no person could be sued unless he appeared as party by name or designation on the face of the instrument' and that the Negotiable Instruments Act presumably reproduced the pre-existing law " as was to be expected in a codifying Act." The learned District Munsif (Mr. K. V. Desikacharry) has in this case dealt very ably with the question of law and I am glad to be able to adopt his whole reasoning on the point. As stated in *Halsbury's Laws of England* (Vol. I, paragraph 463), a man putting ' his unqualified signature ' to a negotiable instrument as in this case' cannot be allowed to escape personal liability unless he clearly and unmistakeably indicates on the instrument taken as a whole that he did not undertake any personal liability. As remarked

1. (1906) I. L. 30 M. 88 at 91.

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in the Munsif's Judgment, "It is quite consistent with the language of the pro-note that as between the plaintiffs and the executant of the pro-note the executant was to be liable and the executant was to adjust the accounts between him and the principal the amount of the pro-note." "A mere description in the body of the pro-note" (that the maker is an agent) "will not exempt" him from personal liability. "The body of the pro-note only sets out the occasion on which the pro-note came to be executed." Why should a holder of a negotiable instrument be driven to make inquiries whether a man who puts his unequivocal signature to it is really an agent of some other person as he described himself in the body or whether he had authority to bind that principal? The very object of the law merchant might be defeated if, when the executant does not choose expressly to repudiate his own personal liability to the holder (whoever he may be) according to the law merchant, he should be allowed to spell out an implied non-liability on his part by involved arguments and by appeals to the negligent practices of people in the mofussil. *Sesha Aiyar* v. *Mangal Dossjee* [1] has no applicability as the maker of the note in that case set up want of consideration as against the original payee himself. The decision in C. R. P. 816 of 1909 turned upon the question whether the payee who was described as an agent of another was the real holder of the note or whether his principal was the real holder and that decision did not affect the question of the liability of a maker who signs as maker without indicating that he does not intend to make himself personally liable. The fact that the note has not been negotiated, to a stranger without notice can become important only when fraud or want of consideration or like defence is set up but is not relevant when considering the legal liability of the maker of the note.

I think that I am fully supported in the above view by the judgment of that learned Judge, the late Krishnaswamy Iyer J., in the case reported in Madras Weekly Notes, [1911] Vol. I, page 143. That case was even stronger for the defendant and weaker for the plaintiff than this case. I have looked into the printed papers in that case and I find that not only did the executant describe himself in the body of the note as an honorary manager but he expressly said that the debt for which he was executing the pro-note was incurred "for the January kist of the Devastanam" of which he was honorary manager. And yet, the learned Judge held that there was no indication that the executant did not intend to make himself personally liable. The learned Judge reversed the judgment of the lower Court which held that the honorary manager was not

1. (1910) 20 M. L. J. 144.

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personally liable. The following passages of the judgment are important:—"The 1st defendant is the executant of the pro-note. He has not signed that pro-note as agent on behalf or anybody else. The description of the 1st defendant in the body of the pro-note as honorary manager is not an indication on the face of the pro-note that the does not make himself liable." In the present case, the recital in the pro-note is to the effect that some lady had incurred some debt and that the executant of the pro-note is the agent of some gentleman (whose connection with the lady who originally incurred debt does not appear from the note itself) and then the executant signs the pro-note in his own name, agreeing personlly to pay the money. ("I shall pay to you or to your order * * * and obtain back the pro-note.") Though I am not bound by the decision of Krishnaswamy Iyer J. sitting singly, I see no reason to dissent from his considered opinion as it is in evident conformity with the English Law which was intended (according to the Full Bench case in 30 Mad. page 88) to be reproduced in the Negotiable Instruments Act.

The 3rd defendant does not allege that plaintiffs had induced the 3rd defendant by misrepresentation or fraud into executing the pro-note with the terms in which it runs. The honest narrative given by the plaintiffs in their plaint as to the circumstances which led to the execution of the pro-note or the ignorance of the plaintiffs and of the 3rd defendant as to their respective mutual rights and liabilities under Exhibit A cannot, in my opinion, deprive the plaintiffs of their legal rights or exonerate the 3rd defendant from his legal liabilities. The questions—(*a*) Whether a person whose name does not appear in a pro-note as obligee or endorsee could be allowed to sue on it, (*b*) Whether a person who is really a benamidar for an undisclosed owner but who is the apparent holder of a note is entitled to sue on it, (*c*) Whether a person who is liable on the face of the note as the maker could escape liability, by pleading that somebody else is alone liable and that he did not intend to make himself liable, and (*d*) Whether a person who is not liable on the face of the instrument could be made liable as the real obligor (or a co-obligor) except in cases in which the Hindu Law could also be applied supplementarily, all these questions have to be decided by Courts according to the law Merchant which modifies the ordinary law of contracts in some respects in order to promote the paramount interests of the trade and commerce of the country and the general convenience of merchants—Whether, in any individual case, justice might not suffer by applying the Law Merchant seems to me to be a subsidiary con-

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sideration—The Full Bench case in 30 Madras page 88 itself shows that the learned Judges did not allow any such subsidiary consideration to affect their decision in that case.

As regards the technical objection that the plaintiffs in their plaint as originally framed prayed primarily for a decree against defendants Nos. 1 and 2 and only in the alternative against defendants Nos. 3 to 5 I do not find that the plaintiffs put forward misrepresentation about the 3rd defendant's authority from the alleged principal (1st defendant) as their cause of action against 3rd defendant. The plaintiffs merely said that if on any grounds, the Court considered that the defendants Nos. 1 and 2 could not be held liable under the negotiable instrument sued on, defendants Nos. 3 to 5 may be made liable. Before the trial, their vakil evidently put forward the definite ground of 3rd defendant's liability based on the Law Merchant and hence an additional issue was framed and the parties went to trial after the additional issue was framed. The plaintiffs could not bring a fresh suit against defendants Nos. 3 to 5 based on 3rd defendant's liability as maker if this suit was dismissed against them and I think that the learned Munsif did not act improperly (having regard to the ordinary character of pleadings in the mofussil) in allowing plaintiffs to put forward definitely a ground of attack against 3rd defendant which was not inconsistent with the plaint allegations and in raising an issue thereon. Having in view the great uncertainty of the law on the point, the vagueness or incompleteness in the plaint in respect of the grounds of 3rd defendant's liability on the pro-note and the short delay of plaintiffs in getting a definite issue on the legal liability of 3rd defendant, should not, in my opinion, be allowed at this stage to defeat the plaintiffs' claim as against him. It is even now not at all certain that defendants Nos. 1 and 2 (more especially 2nd defendant) could be made liable on the pro-note, even if plaintiffs are able to prove that 3rd defendant had authority from 1st defendant to execute the plaint pro-note. Under such circumstances, I am not disposed to defeat plaintiffs' suit against 3rd defendant on the ground that plaintiffs could not rely on 3rd defendant's legal liability as maker but should be allowed to succeed only if they prove that he was guilty of misrepresentation in respect of his alleged authority from 1st defendant. The conduct of defendants Nos. 3 to 5 in scrupulously refraining from making defendants Nos. 1 and 2 parties not only to the regular appeal in the District Court but also to this Second Appeal in this Court (though plaintiffs had expressly prayed to the District Court to make defendants Nos. 1 and 2 parties to the appeal before the District Court, if the District Court was inclined to exonerate defendants Nos. 3 to 5

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indicates to my mind that defendants Nos. 3 to 5 are probably acting in collusion with defendants Nos. 1 and 2 to defeat and delay the plaintiffs' claims.

In the result, I would dismiss the Second Appeal with costs.

Sundara Aiyar J.:—As my learned brother has come to the conclusion that the decision of the lower Courts is correct, the appeal is dismissed with costs under section 98 of the Civil Procedure Code.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Muthukrishnien and others ... *Appellants. (Plaintiffs).**

v.

Viraraghava Iyer and another ... *Respondent. (Defendent).*

Muthukrishnien v. Viraraghava Iyer.

Negotiable instrument—mortgage of—Rights of Mortgagee—Mortgagee allowing suit on negotiable instrument to be barred—Liability of mortgagee—English equitable Rules, applicability to India—Stare decisis, rule of.

A mere hypothecation or mortgage of a negotiable instrument does not vest the ownership in the hypothecatee or mortgagee nor operates as a transfer of the debt. A pledgee of a debt who has not obtained an assignment of it cannot sue to recover the debt.

In the absence of a transfer by endorsement the hypothecatee or mortgagee of it is not entitled to sue on the negotiable instrument and his much less bound to sue on it; and consequently, he is not liable to account for the loss that has occurred to the transferor in allowing it to be barred.

Great care has to be exercised in applying to India the English rules of law as to equitable rights. *Ramasami Pillai* v. *Muthu Chetti*[1] dissented from.

Per Sadasiva Aiyar J:—A pledge of a negotiable instrument is an assignment thereof; and it entitles the pledgee or creditor to sue on it: and a creditor who allows the recovery of the amount due under the instrument to be barred is liable to be debited with the loss in an account between himself and his debtor. *Isri Prasad* v. *Rai Gunga Prasad Singh Bahadur*,[2] *Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan*,[3] *Ramasami Pillai* v. *Muthu Chetti*[1] followed.

The principle of *stare decisis* should be followed in all doubtful matters.

Second appeal from the decree of the District Court of Madura in A. S. Nos. 409 and 310 presented against the decree of the Court of the Principal District Munsif of Madura in O. S. No. 715 of 1909.

C. V. Ananthakrishna Aiyar for appellant.

K. N. Aiya for respondent.

The court delivered the following.

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*S. A. No. 949 of 1911. 30th August 1912.

1. (1910) I. L. R. 34 M. 53. 2. (1910) 14 C. W. N. 165.

3. (1908) I. L. R. 33 B. 610.

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Judgment:—*Sundara Aiyar*, J.—A question of law of some importance has been raised for decision in this case. The plaintiffs sued to recover the amount due on a mortgage bond Exhibit A executed by the 1st defendant to one Muthusami Aiyar, the father of the plaintifts. The bond hypothecated certain immoveable property and certain debts due to the 1st defendant under a promissory note and two simple mortgage documents. All these three documents were apparently handed over to the plaintiff's father along with Exhibit A. The mortgage bonds were returned to the 1st defendent to enable him to realise the monies due under them and pay the same towards the amount due on Exhibit A.

The plaintiffs allege that no payment was really made by the defendants and the 1st defendant's plea that he paid Rs. 100 has been negatived by the Lower Courts. The right to enforce payment of the promissory note (which was executed by a third party in first defendant's favor) became barred by limitation while it was in plaintiff's custody.

It was contended that the plaintiff should be debited with the amount due on the note as he was bound to recover it from the maker. This contention has been upheld by both the Lower Courts. Plaintiffs appeal and the question for decision is whether the plaintiff was bound to collect the amount due on the promissory note. Exhibit A dated 26th October 1902 states, "As I have received Rs. 600 from you by mortgaging the following *i.e.*, the house...and the promissory note mentioned as '2' in the Schedule...for Rs. 500 executed by my brother Sankara Subbier on the 21 November 1901...I promise to repay the said sum of Rs. 600 with interest thereon at one per cent. per month within a year from the date hereof failing which I shall repay the principal and interest theron at 1¼ per cent. per month and add the interest to principal every year and repay the same with compound interest at the rate aforesaid failing which you may proceed against the mortgaged properties, other properties or personally for the collection thereof." The promissory note was not transferred to the plaintiff's father according to the terms of Exhibit A. The note was payable to the 1st defendant 'or order at sight or on demand.' It was not endorsed over by the payee to Muthusami Aiyar when Exhibit A was executed or at any time subsequently. The contention of the respondent here which is the same as in the Lower Court is that the mortgage of a debt when possession of the bond or other instrument evidencing it is handed over to the mortgagee amounts in law to an assignment of it that although the pronote was not endorsed over to Muthusami Aiyar, Exhibit A was sufficient to

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transfer the right to the note as a chose in action to Muthusami Aiyar, and that Muthusami Aiyar was entitled and bound to do every thing in his power to realise the amount due on it failing which he was debitable with the loss caused by his omission to do so. After full consideration I am unable to uphold these contentions. I am of opinion that Muthusami Aiyar and the plaintiffs were not entitled to sue the maker of the note for the recovery of the amount due under it, and even if they were entitled to do so, they were not bound to do so.

If the second point be decided in plaintiffs' favor, it would be sufficient to dispose of the case. A chose in action or a negotiable instrument may no doubt be transferred or *assigned* to a creditor by way of security for a debt, that is, the ownership of the negotiable instrument or the chose in action may be transferred to the creditor and he may be made liable to account for the proceeds as a trustee. If he recovers the amount due he would be bound to apply it towards the debt due to himself, and if the amount exceeds his debt he would be bound to pay the balance to the assignor. This is what I understand by 'assigning a debt or a negotiable instrument by way of security.' But I am unable to hold that a mere hypothecation or mortgage would vest the ownership in the hypothecatee or mortgagee. None of the cases cited by the Respondent except the one to be noticed hereafter goes in my opinion to support the contrary view or to show that a mere mortgagee of a debt or chose in action would be competent to sue the original debtor of the mortgagor for the recovery of the debt. I shall first deal with the decisions that have been relied on by the respondents.

Shyam Kumari v. *Rameshwar Singh*[1] was a decision of the Privy Council. In that case the mortgagor at the time of the mortgage in question executed in favor of the mortgagee another deed spoken of as Bechinama by which he assigned to him a debt due to him from a third person. The question before their Lordships was whether the mortgagee was not bound to use reasonable diligence to recover the assigned debt from the debtor. Their Lordships concurred with the Calcutta High Court in holding that he was bound to do so. The judgment does not touch the question whether when there is no assignment the mortgagee either could, or would be bound to take steps to recover the debt In *Isri Prasad* v. *Rai Gunga Prasad Bahadur*[2] it was held that the mortgagee in the particular case who had sued for the mortgage debt after the claim was time barred and failed to recover any thing was debitable with the amount of the

1. (1904) I. L. R. 32 C. 27. 2. (1910) 14 C. W. N. 165.

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debt. The learned Judges Stephen and Chatterjee JJ. held on the construction of the particular document that both the mortgagee and the mortgagor were entitled to sue the debtor for the original debt. The mortgagee advanced the money partly to provide for the expenses of such a suit. They observed that the mortgage deed contained provisions safeguarding the mortgagee's right in case the mortgagor realised the debt. It does not appear from the judgment whether the terms of the mortgage deed contained a clause assigning the debt to the plaintiffs by way of security but probably it did; for the obligation on the mortgagee's part to get in the debt is rested on a passage cited from Costes 'Law of Mortgage" where it is pointed out that a mortgagee taking an assignment of a debt by way of mortgage " should be specially protected against the obligation which whether by analogy to a mortgagee in possession who is bound to account for what he might have received but for his own default, or to a creditor who, by giving time to the principal debtor, discharges the surety, would otherwise attach to him to get in the debt in due course, under the penalty of being charged with the loss in case any arise through his default." It is clear from the citation made that the learned Judges proceeded on the ground that there was an assignment of the debt in the case. They do not say that any mortgage of a debt would amount to an assignment whether there is a clause purporting to make an assignment or not. They proceeded on the facts found by them in the particular case. Reference is made in the judgment to *Muthu Vijia Ragunatha Ramachandra Vacha Mahat Thurai* v. *Venkatachellam Chetti*[1], in which it was held that a sub-mortgagee is entitled to sue for the sale of the mortgaged property. The learned judges of the Calcutta High Court go on to say that if this is so where a mortgage debt is mortgaged much more must it be the case where the mortgage is of a simple debt. With all respect to the learned judges I am unable to agree with this observation. *Muthu Vijia Ragunatha Ramachandra Vacha Mahat Thurai* v. *Venkatachellam Chetti*[1] did not decide that a sub-mortgagee, could sue to recover the debt due ot his mortgagor, but only that the sub-mortgagee could in suing to recover his own debt bring to sale the properties mortgaged to his mortgagor instead of merely bringing to sale his mortgagor's interest. His interest in what was mortgaged to his mortgagor was held sufficient to entitle him to sell what was mortgaged to his mortgagor. It would be going a great deal further to hold that the sub-mortgagee could sue on the cause of action open to his mortgagor to recover the debt due to the latter.

1. (1896) I. L. R. 20 M. 35.

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In English law the mortgagee is the owner of the property, the mortgagor's right being only an equitable interest. When the mortgagee sub-mortgages, the sub-mortgagor would in turn become the legal owner and would be entitled to foreclose in the same manner as his mortgagor himself could. The decision in favor of the sub-mortgagee's right was based partly on the provisions of the Transfer of Property Act S. 86. The mortgagor's right of redemption exists not only against his mortgagee but as against the sub-mortgagee. This was relied on as giving a corresponding right to the sub-mortgagee to bring the original mortgagor's right to sale for the enforcement of his sub-mortgage. The sub-mortgagee certainly could not sue his mortgagor's mortgagor for the recovery of his debt by the sale of the original mortgagor's rights without making the mortgagee himself a party. The right recognised by the learned judges must, I think, be rested on the ground that both the mortgagee and the sub-mortgagee having rights in what was mortgaged by the original mortgagor, the sub-mortgagee is entitled to recover his own rights by getting the Court to adjudicate upon the respective rights of himself and his mortgagor. In any case *Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai* v. *Venkatachellam Chetti*,[1] does not throw any duty on the sub-mortgagee to sue the original mortgagor for the latter's benefit.

Ardesir Beyonji Surti v. *Syed Sirdar Ali Khan*[2] was a case where the debt was assigned to the mortgagee, *Chandavarkar* J. expressly bases his judgment on the ground that the transaction amounted to an assignment although there was difficulty in the construction of the documents. The learned judge observes "The English cases cited before us as making a distinction between a charge and an assignment have no bearing on the question here, which must be decided solely with reference to the intention and conduct of the parties disclosed in the evidence and the provisions of the Transfer of Property Act. The transactions evidenced by Exhibit 14 and Exhibit 14 A are substantially transfer of 'an actionable claim' dealt with in Chapter VIII of that Act." The learned Judge then enunciates a further proposition which with all respect appears to me to go too far and is not consistent with the view taken in English Law "Where a creditor purports to create a lien or charge on the debt due to him in favor of another person the words 'lien' or 'charge' have no meaning except as giving the latter a right to recover the debt from the debtor. The transaction is in reality one where by the owner of what in English Law is called a *chose in action*

1. (1896) I. L. R. 20 M. 35 2. (1908) I. L. R. 33 B. 610.

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transfers it to another. And that is what the evidence in this case establishes to have been the intention of the parties to Exhibits 14 and 14 A." On the finding of the learned Judge that the parties intended in the particular case to make an assignment the decision is unimpeachable. But the *dictum* above cited seems to me to go too far.

Another case referred to at the Bar is *Makund Lall* v. *Raghoput Doss*[1] Dr. Rash Behari Ghose in his well-known treatise on Mortgages doubts the correctness of this decision. The learned Judges held that although the mortgagee in the case was by the provisions of the document authorised and required to sue on the bond mortgaged to him he was not bound to do so. I share in Dr. Ghose's doubt as to the correctness of that decision. In the name of the case will be noted when there was an assigment of the bond to the mortgagee and he was made accountable for the proceeds of it.

Durham Brothers v. *Robertson*[2] was relied on by the learned Vakil for the appellant. That case seems to me to be against the respondent. The question raised there was whether according to the provisions of S. 25 sub-section 6 of the Judicature Act of 1873 a person who has an absolute assignment of a debt, but by way of security and not absolutely could maintain a suit for the recovery of the debt. The Court below held that he could not. The sub-section of the Judicature Act referred to provides "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action shall be, and be, deemed to have been effectual in law......... to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor." In that case it was held that the assignment was by way of charge only and not absolute. The Judgment of Chitty L. J. explains the circumstances which led to the enactment of the section. He points out that in equity a mere charge would operate as a partial equitable assignment. "In his suit in equity, even when the assignment was absolute on the face of it, he had to make his assignor, the original creditor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit.

1. (1867) 2 Agra. 83.

2. (1898) 1 Q. B. 765.

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This was *a fortiori* the case where the assignment was by way of security or by way of charge only, because the assignor had a right to redeem. Further the assignee could not give a valid discharge for the debt to the original debtor unless expressly empowered so to do. The original debtor, whether he admitted the debt or not, was not concerned with the state of the accounts between the assignor and the assignee where the debt was assigned by way of security.

"Now it was in order to afford some remedy for this state of the law that sub S. 6 was passed. It is plain on reading it that it does not apply to every case of equitable assignment of a debt or chose in action." "Two matters as is apparent on the face of it, had to be regarded: first, the simplifying the remedy in favor of the assignee; and secondly, the protection of the original debtor." The Lord Justice later on refers to the judgment of Willes J. in *Halliday* v. *Holgate*[1] where that learned Judge distinguished between lien, pledge and mortgage, and spoke of a mortgage as passing the property out and out. He then says—"A mortgage is not mentioned in the enactment; but where there is an absolute assignment of the debt the limiting words as to a charge only are not sufficient to exclude a mortgage." It seems to me that the learned Justice makes a clear distinction between a case where there is an absolute assignment and one where there is not. In *Halliday* v. *Holgate*[1] already referred to a pledge is stated, by Willes J. to be intermediate between lien and 'mortgage.' But he does not say that the pledgee has such a property in the pledge as would entitle him to sue against the original debtor.

No English case has been cited at the arguments where it was decided that a person having a charge over a debt without having the debt assigned to him could sue the original debtor for the recovery of the debt.

In *Brice* v. *Bannister*[2] it was no doubt held that after notice of assignment of part of a debt is given by the assignee to the original debtor, the latter would not be justified in paying the debt to his creditor and if he does so, he would be accountable to the assignee for it. Brett L. J. did not agree and was of opinion that the assignee's right must be confined to cases where a debt had actually accrued due from the original debtor at the time of the assignment. But this case lends no support to the view that a person who has a mere charge without an assignment can sue for the debt. If a charge over a debt has been given by the creditor to a third person and notice of it has been given to the original debtor, the latter no

1. (1868) L. R. 3 Ex. 299.

2. (1878) 3 Q. B. D. 569.

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doubt cannot prejudice the rights of the holder of the charge by paying the debt to his creditor. But that does not show that the charge holder can himself sue the the original debtor for the recovery of the debt due to the creditor.

On the other hand in *Exparte Mure*[1], a clear distinction is drawn by Lord Thurlow between a case where only a charge has been created and one where there is an assignment. His Lordship says. " This being so Woodbridges assign to Turner, by an indenture containing a bare recital of what I have stated, and that Woodbridges were indebted to Turner in a considerable sum of money, and in order to make a security for this, what is done? Why an absolute assignment of this bond is made not recoverable in any manner nor any account provided for. I am not now proceeding on an idea that in the actual situation of the thing an account might not have been demanded; for it might have happened that Turner's debt might have been by other means diminished below the amount of bond; in which case he must have accounted with Woodbridges, although no provision was made for it. But I mention this only to show; that in the idea of parties they were giving this absolutely to Turner and that the whole would be exhausted in satisfying Turner's demand." In another passage he observes " In the present case I think the bond was in the same situation in the hands of Turner as if it had been capable of assignment and had been actually assigned to and vested in him at law, he was in all respects the absolute master of the bond. It has been asked, if the bond had been merely lodged in the hands of Turner without an assignment *or a power of attorney* what would then have been the case? There it would be apparent that something farther remained to be done to give the ownership of the bond: to whom then did it belong in that case to make the first movement? I think there it would belong to the owner of the bond, and the pledgee would not be liable: for there the owner had not completely clothed the pledgee with the authority of acting on the bond,or put the bond out of his own power but kept the property in himself and the power of giving credit or not to the debtor, as he pleased...When one speaks of a distinction between an equitable and legal interest, it can mean nothing more than that the equitable interest has not the full power and dominion over the subject: for where the equitable interest is effectually clothed with the whole power it must be the same thing as if the legal interest were vested, and consequently the assignee answerable for the discretion he has exercised." See also *Williams* v. *Price*[2]. In that case

1. (1788) 2 Cox. 264 s. c. 30 E.R. 30. 2. (1824) 1 Sim. & St. 587 s.c. 57 E.R. 229.

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there was an assignment of the bond and the Chancellor Sir John Leach abstained from expressing an opinion on the question whether even in such a case a creditor would be bound to take steps to realize the debt. But he was held liable in that case because he actually sued out execution and by his wilful default of duty the debt became irrecoverable. In Jones on 'Pledges and Collateral Securities' 738 at p. 741, it is observed "the ground of a creditor's liability for a loss to his debtor occurring through his creditor's negligence in enforcing the collateral security, is said to rest in the privity of contract between the debtor and the creditor, established by the debtor's assignment of the collateral which invests the creditor with the ownership of the collateral for all purposes of dominion over the debt assigned. He alone is empowered to receive the money to be paid upon it and to control it in order to protect his right under the assignment."

Great care has to be exercised in applying in this country the rules laid down in English Law with regard to equitable rights. Dr. Rash Behari Ghose in his book on Mortgages (see IVth Edn. p. 107) observes—"I trust that this cloud in the not very clear sky of English Jurisprudence will not darken the law in this country. We have nothing whatever to do either with legal or equitable rights and the highly ambiguous term 'special property' like other unweeded remnants in the English law is only calculated to perplex and bewilder the Indian student."

In India the mortgagee's right is to bring the property mortgaged to him to sale. The Indian Contract Act speaks only of pledge of goods. It may be assumed that incorporeal property although not goods in the ordinary sense may be pledged, for it is capable of constructive delivery of possession and that chose in action, negotiable instruments, shares in a company and even patent rights may be given in pledge. It is not clear whether in this case the plaintiff could be regarded as a pledgee of the promissory note He was not authorised by Exhibit A to sell it. The pro-note not having been endorsed to him he could not sell it effectually as a negotiable instrument as he could not endorse it over to a purchaser. There is nothing in Exhibit. A to show that he was intended to have the power to make a private sale of the note. On the other hand the stipulation in Exhibit. A is that if the debt is not paid within the due date he is to be entitled to recover the debt by sale of the hypothecated properties through court.

But assuming that he is a pledgee no authority has been cited to show that a pledgee for a debt who has not obtained an assignment of it can sue to recover the debt.

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According to American Law, a negotiable instrument requiring endorsement should be endorsed to make a valid pledge. To make the pledge an effectual security, it is necessary that the pledgee should have an effective title (See Jones on Pledges and Collateral Securities S. 9 p. 12. also S. 80 p. 79 where the absence of endorsement is stated to show that the property in the negotiable instrument would not effectively pass to the mortgagee.)

I am prepared to assume that if a negotiable instrument is duly endorsed over to a pledgee it may be taken to be the intention of the parties that the mortgagee should take steps to realise it. But I do not think that such duty can lie on him where there has been no endorsement.

It was argued that without an endorsement a promissory note could be transferred by a written instrument. But Exhibit A does not amount to a transfer. There is as I have already stated no substantial basis for the contention that a mere mortgage of a debt without words of assignment would operate as a transfer of the debt. Appropriate language must be used to make an assignment although it is not necessary that the beneficial interest should be vested wholly in the mortgagee and he may be required to hold the proceeds in trust for the assignor. The intention of the parties in the present case was clearly not to make any assignment. The absence of endorsement on the promissory note by the 1st defendant is to my mind practically conclusive proof of it. There is absolutely no reason to suppose that it was intended to transfer the amount of the promissory note as a mere chose in action. I am clearly of opinion therefore that no duty lay on the plaintiff to realize the amount due on the promissory note as a mere chose in action. There is nothing to pervent the 1st defendant in whom the ownership vested from instituting a suit himself. Assuming that the plaintiff could have instituted a suit to recover the amount of the debt I am of opinion there is nothing to shew that it was intended that he should be bound to do so. The case would then be similar to the one in *Isri Prasad* v. *Rai Ganga Prasad Singh Bahadur*,[1] where both parties were held entitled to sue.

For the reasons already stated I am further of opinion that the plaintiffs were not entitled to sue for the recovery of the debt. *Ramasami Pillai* v. *Muthu Chetti*[2] was strongly relied on to show that a suit by the plaintiff would have been maintainable. In that case the original creditor was a party to the suit and did not dispute the plaintiff's right to recover. The actual decision may be supportable on this ground though *Miller* and *Krishnaswami Aiyar* JJ. no doubt

1. (1910) 14 C. W. N, 165. 2. (1910) I. L. R. 34 M. 53.

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held that the owner of a charge on a debt could maintain an action to recover it from the debtor. *Muthukrishna Raghunatha Ramachandra Vacha Mahot Thurai* v. *Venkatachellam Chetti.*[1] *Isri Prasad Singh* v. *Rai Ganga Prasad Singh*[2] and *Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan*[3] were cited in support of the judgment. I have already examined these cases and in my opinion do not support the view taken by the learned Judges although the *dictum* of Chandravarkar J in *Ardesir Bejonji Surti* v. *Syed Sirdar Ali khan*[3] is expressed too widely.

Reference is also made to *Durham Brothers* v. *Robertson.*[4] But that judgment in my opinion does not support the construction put upon it. On the other hand it shows that where there is no assignment but only a charge, the charge holder could not maintain a suit. S. 134 of the Transfer of Property Act is also referred to but I am unable to see what there is in that section to support the view taken. It appears to me to be a serious thing to hold that every hypothecatee of debts is bound to sue all the debtors. It may be that debts of much larger amount than the loan advanced are hypothecated as security for it. Are we then to hold that the hypothecatee is bound to incur the expenses of realising every one of these debts that may become payable and to be accountable for them to the hypothecator. That would be to make the hypothecatee a trustee for his debtor. The debtor would then be in a position to hold the mortgagee responsible not only for the recovery of the debts which are about to be barred by limitation ; but also for not realising within a reasonable time everyone of the hypothecated debts for it would be open to him to say that if prompt steps had been taken the debts might have been recovered and that the delay has made it difficult for him to do so. Such a risk can be thrown on the creditor only where the nature of the transaction is such as to imply a contract that he should realise the debt. I hold therefore that the plaintiff was not responsible for the loss incurred by the promissory note being barred by limitation. The decrees of the lower courts must therefore be modified by awarding to the plaintiffs a further sum of Rs. 500—the amount of the promissory note and the interest due thereon for 3 years.

As my learned brother has come to a different conclusion the second appeal is dismissed with costs under section 98 of the Civil Procedure Code.

Sadasiva Aiyar, J.—The facts are set out in the judgment of my learned brother and I need not repeat them.

1. (1896) I. L. R. 20 M. 435.
2. (1910) 14 C. W. N. 165.
3. (1909) I. L. R. 33 B. 610.
4. (1898) 1 Q. B. 765.

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The questions for decision are (a) whether the pledge by the debtor to the creditor of a promissory note in the debtor's favour as security for the debt constitutes an assignment of the promissory note which entitled the creditor to sue for and realise the amount of the pro-note (b) whether if it so entitles him it also casts a legal obligation on him to use due diligence to collect the money from the party liable on the note to sue if necessary on the pronote before it is barred and to realise the amount of the pronote and (c) whether if he is guilty of laches in so collecting the money which he could have collected, he is liable to be debited with the loss incurred by his default when accounts are taken between himself and his debtors.

I do not think it necessary to consider in detail the English and American cases on the point whether a pledge or hypothecation of a chose in action or pro-note will constitute an assignment of the chose in action or pro-note and will enable the pledgee or hypothecatee to sue for recovery of the money. I think that the principle *stare decisis* should be followed in all doubtful matters and I find that three of the High Courts in India have in recent cases adopted the view that the creation of even a charge in the creditor's favour is an assignment of the chose in action. The cases *Isri Prasad* v. *Rai Ganga Prasad Singh Bahadur*,[1] *Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan*[2] and *Ramasami Pillai* v. *Muthu Chetti*[3] and the observations in Coote on Mortgages (Vol. I page 318) seem to me to be clear authorities for the above proposition. The case in *Ramasami Pillai* v. *Muthu Chetti*[3] is binding till it is set aside by a Full Bench. I shall however, assume for the sake of argument that a mere declaration of the creation of a charge on the chose in action in favour of the creditor does not constitute a complete assignment by the debtor of his rights in the chose in action. But if besides the declaration of such a charge, the instrument which evidences the chose in action is put in the possession of the creditor, I think that the reasonable view to be taken of such a transaction is that the debtor intended thereby to divest himself of the power to sue on the instrument to realise the said chose in action and that he intended to vest such right in the creditor. An usufructuary mortgagee, though the land is given into his possession as security for his debt and not as full owner and though he himself has an interest in the property holds also a position analogous to that of a trustee for the mortgagor so far as proper management of the property collection of rents and profits

1. (1910) 14 C. W. N. 165. 2. (1909) I. L. R. 33 B. 610.
3. (1910) I. L. R. 34 M. 53.

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making necessary repairs and preservation of the mortgaged property are concerned. I think that on principle, the pledgee with possession of the instrument evidencing a chose in action who has been given the rights of hypothecatee in the chose in action (even if he is not expressly called a complete assignee) is entitled in his own right and bound as trustee for his debtor to use due diligence in suing on the instrument and recovering the money due there under. The consideration that the instrument on which the charge is created may be for a much larger amount than the amount of the loan for which it is given as security seems to me to be immaterial just as it is immaterial in the consideration of a usufructuary mortgagee's duties in respect of the mortgaged property put into his possession to consider whether the value of the property is not so much greater than the mortgage amount that it would be a grievous hardship on the mortgagee to make him responsible for its due management etc. If the creditor considered that the security he is put in possession of is too valuable or too onerous for him to take due care and custody of it he was at liberty to have declined it.

The observations in Jones on Pledges and Collateral Securities page 741 seem to establish that a creditor who holds a collateral security is bound to exercise reasonable diligence in enforcing and realising it and is liable to his debtor for the loss which might have been caused by his (the creditor's) negligence in so enforcing it. This liability is analogous to the duty which the creditor owes to a surety and which is expressly provided for in section 139 and 141 of the Contract Act. Section 139 (illustration B) states that the creditor's failure to use due diligence in realising a collateral security will exonerate the surety from liability. Section 141 provides that if a security is lost by the creditor the surety is discharged to the extent of the value of the security. A person who gets possession of anything as a pledgee is a bailee and under section 151 of the Contract Act he is bound to take reasonable care of the pledged property. It is surely not taking such a care if the property is made to become valueless.

In the result, I think that no interference is called for in second Appeal with either the finding of fact by the Lower Appellate Court that plaintiff caused loss to his mortgagor by not diligently suing for the realisation of the collateral security or with the finding of law that plaintiff is liable to give credit in defendant's favour for the loss so caused. I would therefore dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Bana Veeramma ... *Appellant* (Plaintiff.)*

v

Gungala Chinna Reddy and others. *Respondents* (Defendants.)

Veeramma *v.* Chinna Reddy.

Evidence Act Ss. 107 108,—Scope of—Presumption in law and in fact—Adverse possession—Tacking on of possession.

There is no presumption in law that a man was alive until the expiration of seven years from the date he was last heard of. Ss. 107 and 108 of the Evidence Act deal with the procedure to be followed when a question is raised before a court as to whether a person is alive or dead. Neither of the sections lays down any presumption as to how long a man was alive or at what time he died.

Naiki v. *Lalsahu*[1] *Muhammad Sheriff* v. *Banda Ali*[2] referred to.

It depends upon the circumstances of each case whether a Court would or would not make the presumption that a person last heard of within seven years is alive, even assuming that a court may make such presumption.

A person who has been found to have no title cannot, rely on the possession of another when the former has not entered in possession as the latter's heir.

Second appeal from the decree of the District Court of Cuddapah in appeal suit No. 127 of 1909 presented against the decree of the Court of the District Munsif of Proddatur in Original No. 666 of 1908.

P. R. Ganapathi Aiyar for appellant.

S. Gopalaswami Aiyangar for respondent.

The Court delivered the following

Judgment:—This is a suit for possession of a house site. The plaintiff stated in her plaint that the house was purchased by her elders, that her husband left the place and went away to foreign places, that she and her father-in-law lived in it subsequently for 5 or 6 years, that the father-in-law then died, that she then continued to live in the house for some time till it fell down, that she then went to live with her brother in another village, and that when she returned to the village in 1908 she found that the defendants had trespassed on it.

The defendants put the plaintiff to the proof of her title and possession. The case that the plaintiff attempted to make out at the hearing was that she succeeded to the house as the heir of her husband. No positive evidence was adduced to shew that her husband survived

* S. A. No. 32 of 1911. 30th July 1912.

1. (1909) I. L. R. 37 C. 103. 2. (1911) I. L. R. 34 A. 36.

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her father-in-law. She could not succeed unless the Court found that she did so. It is argued by the learned Vakil for the appellant that the appellate court was bound to presume that her husband lived for a period of 7 years after he left the village and that as the father-in-law died before the expiration of the 7 years the husband must be taken to have survived him. Reliance is placed on the combined effect of sections 107 and 108 of the Indian Evidence Act The former section states that if a person is proved to have lived within a period of 30 years and the question is whether he is alive or dead the onus is on the party who asserts that he is dead. This is qualified by Sec. 108 which lays down that when it is proved that a person has not been heard of for 7 years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is on the person who affirms it. It is argued that in as much as under section 107 it is enough to prove that a man was alive within 30 years to throw the onus of proving his death on the party who asserts it there is a presumption that he lived during the 30 years and that section 108 modifies it only where it is proved that the person was not heard of for 7 years. We are unable to agree with the appellant's Vakil as to the meaning to be put on section 107. Both sections 107 and 108 deal with the procedure to be followed when a question is raised before a court as to whether a person is alive or dead. Neither of these sections in our opinion lays down any presumption as to how long a man was alive or at what time he died. The contention for the appellant is not supported by any Indian authority cited before us. On the other hand the view we take is supported by the pronouncement of the Calcutta High Court in *Naiki* v. *Lalsahu*,[1] and of the Allahabad High Court in a recent Full Bench decision in *Muhammed Sherif* v. *Bande Ali*[2]. A passage from Lawson on Presumptive Evidence has been read to us which goes to shew that in America there is a presumption that a man was alive until the expiration of the period of 7 years from the time that he was last heard of. That in our opinion is not the Indian Law. Then it is argued that there is at least a presumption of fact that the husband was alive for 7 years after he was heard of. Assuming that a Court may make a presumption that a man was alive during some period after he was heard of, it would depend entirely on the circumstances whether the Court would make such presumption or not. We are unable to say that on the facts placed before us, the Court should have inferred as a presumption of fact that plaintiff's husband was alive when his father died even if we would be justified in interfering in second appeal on the ground that a presumption of fact

1. (1909) I. L. R. 37 C. 103.. 2. (1911) I. L R. 34. A. 36.

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has not been made. We are therefore unable to interfere with the finding on the question of title.

Then it is contended that the finding on the question of plaintiff's possession cannot legally be upheld. The finding perhaps is not quite satisfactory. But the plaintiff's own case was that though she lived in the house for sometime after her father-in-law died she left it as the house fell down 20 years before the suit. It is not shewn how her possession could be taken to continue during the period of her absence. Nor is it shewn that she had acquired a title by prescrip-ption before she left the place. We cannot agree that the plaintiff would be entitled to tack her own possession on to that of her father-in-law. A person who has been found to have no title cannot rely on the possession of another when he did not enter on possession as his heir. Here the plaintiff's case was that she entered on possession as heir of her husband, not of her father-in-law. On the whole we do not think that we would be justified in interfering in this case in second appeal. We therefore dimiss it with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Napier.

Sri Sri Nadaduru Rajaguru Satagopala Charlu. } *Plaintiff* (*Appellant*)*

v.

Satrughna Behara and another. *Defendants* (*Respondents*)

Satagopala Charlu v. Satrughna Behara.

Criminal Procedure Code Ss. 165 cl 2, S. 103—'Conducting in person'—Meaning of—Non compliance with provisions of S. 103—effect of.

S. 165 Criminal Procedure Code only requires that the officer referred to in the cl. (2) should be present on the spot and exercise a general supervision over the search in *contra distinction* to cases where he is unable to go to the spot and deputes a subordinate by written order to conduct the search in his place.

The words "*in person*" in cl. (2) do not mean that the officer *conducting* the search must himself make the search, *e.g.*, ransack boxes, examine the roof, dig up the floor, or otherwise seek for the property. *Venkatappa Naidu v. King-Emperor*[1] dissented from.

Failure to strictly comply with the provisions of S. 103 Criminal Procedure Code *e. g.*, in calling the inhabitants of the locality as witnesses does not make the search *per se* illegal. *Queen-Empress* v. *Raman*[2] followed.

Appeal from the decree of the District Court of Ganjam in O. S. No 1 of 1908.

S. Srinivasa Aiyangar for appellant.

T. R. Ramachandra Aiyar for respondents.

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* A. No. 88 of 1909. 26th September 1912

1. (1907) 17 M. L. J. 323. 2. (1897) I. L. R. 21 M. 83.

Satagopala Charlu v. Satrughna Behara.

The Court delivered the following :—

Judgment :—The suit is brought to recover damages for the wrongful acts of Defendants (Respondents) in maliciously searching Plaintiff's (Appellant's) house on 17th June 1907 in connection with a case of house-breaking and theft in 1st Defendant's house. 2nd Defendant is the Police Inspector who conducted the search.

It is not argued before us that there is any evidence of malice on the part of the 2nd Defendant but it is contended that the search was illegal in certain particulars and therefore wrongful such as to give rise to an action for damages.

On the evidence before us we are unable to find any illegality in the search. The Inspector is said to have remained outside the house while the actual search was being made by two constables; and the learned vakil for the Appellant argues relying on the ruling of *Boddam* J. in *Venkatappa Naidu* v. *King-Emperor*,[1] that this was not conducting the search in person within the meaning of S. 165 of the Criminal Procedure Code. With all respect to the learned judge who decided that case we feel bound to differ from his view. We do not understand the section to mean that an Officer in charge of Police Station or investigating Officer personally conducting a search must himself make the search *e. g.* ransack boxes, examine the roof, dig up the floor, or otherwise seek for the property. Nor do we understand it to be necessary that all those processes must take place under his eye. What we do understand the section to mean is that the officer should be present on the spot and exercise a general supervision over the search, in contradistinction to the cases where he is unable to go to the spot, and deputes a subordinate by a written order to conduct the search in his place.

It is next argued that the Inspector's failure to call inhabitants of the locality as witnesses to the search renders it illegal. For this Inspector has given an explanation and the failure to strictly comply, with the provisions of S. 103 does not in our opinion make a search illegal (vide *Queen Empress* v. *Raman*.[2])

We find no illegality in the search.

As regards the 1st Defendant the search was admittedly made in consequence of information furnished not by him but by two dandasis. We can find nothing from which it could be inferred that these dandasis were instigated by 1st Defendant nor can we infer malice from the fact that 1st defendant professed to identify a bag of money found in the search.

The appeal is dismissed with costs.

1. (1907) 17 M. L. J. 323.

2. (1897) I. L. R. 21 M. 83.

IN THE HIGH COURT OF JUDICATAURE AT MADRAS.

Present:—Sir Ralph Sillery Benson, *Officiating Chief Justice* Mr. Justice Sankaran Nair, and Mr. Justice Sundara Aiyar.

Munireddi ...	...	**Petitioner in Referred Case No. 9 of 1912. and Respondent in C. R. P. No. 485 of 1911.*
Marwadi Motiram	...	*Do. 10. Do.*
v.		
K. Venkata Rao	...	*Counter—Petitioner in both and Petitioner in C. R. P. No. 485 of 1911.*

Legal Practitioners' Act S. 13—Professional Misconduct—Evidence Act, Ss. 11, 40, 41, 42—Judgment, in civil case—Relevancy and admissibility in Enquiry—Failure to appeal—Assignment of actionable claim—Transfer of Property Act S. 136—Engaging in trade—Rules under the Legal Practitioners' Act, Rule 27.

Munireddi, Marwadi Motiram v Venkata Rao.

Per Curiam:—The judgment in a civil case between a client and his pleader touching the terms of the engagement of the pleader and his conduct of the case is relevant and admissible evidence in a subsequent enquiry against the pleader under S. 13 of the Legal Practitioners' Act; but it is not conclusive evidence against the pleader.

Failure to appear for a client who has engaged the pleader for a case is professional misconduct.

A pleader is guilty of professional misconduct in taking a transfer of an actionable claim in contravention of S. 136 of the Transfer of Property Act.

Failure to obtain the sanction of Court before a pleader engages in trade is in contravention of rule 27 of the rules framed under the Legal Practitioners' Act.

Per *Sankaran Nair* J.—A pleader by engaging in a trade cannot be said to act unprofessionally. The notion that no trade however honestly carried on is worthy of a vakil is a relic of the times that have passed away and its introduction in India should be a matter for regret. The advisability of any rule prohibiting pleaders from engaging themselves in trade doubted.

A Vakil is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid in the absence of any agreement to the contrary or at least notice to that effect to the client in sufficient time to enable him to make other arrangements.

Cases of misconduct in which the Court would exercise its disciplinary jurisdiction and cases where it would leave the client to his own remedy against the pleader indicated.

The onus is upon the pleader to show that his action in taking a transfer of an actionable claim did not amount to gross misconduct in the circumstance of the case before the Court.

Per *Sundara Aiyar* J.—The question as to whether and how far a pleader can engage himself in trade or business other than the profession, considered.

*R.C. Nos. 9 and 10 of 1912 & C.R.P. No. 485 of 1911. 2nd October 1912.

Munireddi, Marwadi Motiram v. Venkata Rao.

Quaere:—In the absence of an agreement to that effect, whether non-payment of a portion of the fee stipulated would absolve the pleader from his duty to appear for the client in the conduct of the client's case in court.

Cases stated under section 14 of Act XVIII of 1879, by the District Judge of Bellary in O. P. Nos. 102 and 313 of 1911 on the file of his court, and Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the District Court of Bellary in Appeal No. 21 of 1911.

The *Advocate-General* on behalf of Government in Referred Case No. 9 of 1912 and on behalf of the Pleadership Examination Board in Referred Case No. 10 of 1912.

K. Srinivasa Aiyangar, Vakil on behalf of the Vakils' Association in both.

T. Richmond and *M. Govindarajalu Naidu* Counsel for the petitioner in Referred Case No. 10 of 1912.

T. Rangachariar, for Counter-petitioner in Referred Case No. 9 of 1912.

T. Rangachariar and *S. Ranganadah Aiyar*, for Counter-petitioner in Referred Case No. 10 of 1911.

In this case a First Grade Pleader was charged with unprofessional conduct in that he after engaging himself to defend an accused both in the committing Magistrate's Court and in the Sessions trial for a consolidated fee failed to defend him in the Sessions trial. The defence was that the engagement was only for work in the committing Magistrate's Court and to move for bail before the Sessions Court. The client having had to engage another pleader for defending him in the Sessions trial, sued for damages for breach of contract in the Sub Court and succeeded in the District Court on appeal. The District Judge found the client's story to be true and the defence to be false. The Pleader filed a Civil petition against the judgment in appeal.

Ag. Advocate-General (*J. L. Rosario*) for the court though there is no exact decision as to whether the judgment of the District Judge on appeal is conclusive on the pleader the decision in *In the matter of Rajendro Nath Mukerji*[1], would seem to show that the pleader cannot go behind the judgment; it is not an anologous case. [*S. Aiyar* J. Is there not a difference between a judgment in a criminal trial and in a Civil Case. In the former a conviction is possible only if the case is proved beyond reasonable doubt; in the latter the judgment is on a balance of probabilities.]

1. (1899) I. L. R. 22 A 89 at 53 (P. C.)

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Further argument was addressed towards showing the correctness of the District Judge's Judgment on appeal.

T. Rangachari.—No enquiry has been made in this matter. The judge simply imported into this enquiry all that took place in the previous case The witnesses are alive and they must be examined newly for the enquiry. The enquiry is in the nature of a criminal trial and the pleader himself cannot be examined on oath. *Kotha Subha Chetti* v. *The Queen*[1]. The Judgment is not admissible unless it is one of conviction of the pleader, as mentioned in S. 12 of the Legal Practitioners' Act. *In re Lubeck*[2]. [*Sankara Nair* J. There was no judgment in that case to which the counsel was a party.] But it shows that extraneous record ought not to be imported into this enquiry. S. 1 of the Evidence Act says that the Act applies to all judicial proceedings. [*Sundara Aiyar* J. Are the rules of evidence exhaustive ? see S. 11]. A judgment is not a fact, it is only an opinion of a third party. The truth of facts in issue in this enquiry will not be spoken to by the filing of the judg ment. S 43 Evidence Act.

Supposing that I can go behind the judgment, I submit that the facts do not prove the guilt. Even if we suppose that the facts found are true, then the pleader is guilty only of negligence. Even if there is gross negligence that is not misconduct, unless there is dishonourable conduct on his part both as a man and as a professional gentleman. Cordery on Solicitors p. 180 *In re a Solicitor* [3] [Court. Refer to the recent decision of the Privy Council in which gross negligence is punished.] The pleader is not to be punished in this way for falsely supporting his case wherein he was a party—If so he could he punished for perjury—The party has had his remedy by a decree against him for damages. [*Sundara Aiyar* J. Is not your subsequent denial an aggravation of your previous guilt?] Denial is not *professional* misconduct.

K. Srinivasa Aiyangar for Vakils' Association. Gross negligence is a mattter for the disciplinary jurisdiction of the Court.

Advocate-General in reply. Subsequent false denial also ought to be looked into. [*Sundara Aiyar* J. Why should he be deprived of his usual liberty as a litigant?] Still the character of the man is also to be taken into consideration. " Other reasonable cause" also can we shown.

The court delivered the following

1. (1883) I. L. R. 6 M. 252. 2. (1905) I. L. R. 33 C. 151, 168 (P. C.)
3. 33 Solicitors Journal 397.

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Judgment:—*Referred Case No. 9 of* 1912. *Sundara Aiyar* J. This is a case of misconduct against a First Grade Pleader practising in Bellary. One Muni Reddi lodged a complaint against the pleader charging him with the misconduct for which he has been tried by the District Judge of Bellary. He subsequently withdrew his complaint, but as the District Judge had before the withdrawal already framed a charge against the pleader, he proceeded with the inquiry, found him guilty of the misconduct charged, and made a report to this Court under section 14 of the Legal Practitioners' Act.

The facts that led up to the charge are briefly as follows:—An inquiry into a charge of dacoity was going on about June 1908 in the Sub-Magistrate's Court of Tadpatri against Muni Reddi. The pleader was engaged according to Muni Reddi's case to defend him both in the Magistrate's Court and in the Sessions Court of Bellary in the event of the case being committed to the Sessions Court for trial; and a fee of Rs. 350-0-0 was settled and paid for the pleader's services in both Courts. The pleader appeared in the Magistrate's Court but did not defend Muni Reddi in the Sessions Court. He left the District for Rangoon without making any arrangement for Muni Reddi's defence at the Sessions trial. Another pleader had to be engaged for the defence. Muni Reddi was acquitted at the trial. He subsequently instituted a suit for the recovery of the fees paid by him with interest. It was transferred to the Subordinate Judge's Court of Bellary for trial. The pleader defended the suit contending that his engagement with Muni Reddi was only to defend him in the Magistrate Court and to put in a petition for bail in the Sessions Court, and did not include Muni Reddi's defence at the Sessions trial; that only Rs. 268 and not the whole of the Rs. 350 stipulated for was paid to him by Muni Reddi; that although Muni Reddi afterwards asserted that he had undertaken the defence in Sessions Court also, he repudiated any such agreement and that he had not failed to fulfil the engagement actually entered into by him. The Subordinate Judge dismissed the suit upholding the pleader's defence. On appeal the District Judge Mr. Phillips reversed the judgment of the Subordinate Judge and found the defendant's contentions to be untrue. He passed an order under Section 476 of the Code of Criminal Procedure directing the prosecution of the pleader for making a false statement on a comparatively unimportant point. The order was set aside by this court in revision and it is unnecessary to refer to it further. Muni Reddi afterwards put in a petition against the pleader under the Legal Practitioners'

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Act requesting that an inquiry should be made into the pleader's conduct, but as already stated, he subsequently withdrew the petition. The charge framed against the pleader was that having agreed to appear for Muni Reddi in Sessions Court and received the fee for such appearance he failed to appear, and when asked to return the fee he failed to do so, and that in defending the suit filed by Muni Reddi he denied receipt of part of the fees, and also denied that he was engaged to work in the Sessions Court; and that therefore he was guilty of fraudulent and improper conduct in the discharge of his professional duty, an offence under section 13 (b) of the Legal Practitioners' Act. No fresh evidence was recorded in support of the charge and indeed there was no one to let in evidence as Muni Reddi had withdrawn his complaint. The pleader evidently relied on the evidence he had already adduced in the civil suit but he also adduced some fresh evidence. He examined two witnesses and gave evidence again himself. He also put in his account books and diary which he had not filed in the civil suit. The District Judge after considering the fresh evidence adhered to the conclusions he had arrived at in his judgment in the appeal from the Subordinate Judge's decision in the civil suit.

Mr. Rangachariar who has appeared for the pleader at the hearing of the charge against the pleader in this Court has raised an objection which if well founded would go to the root of the whole proceedings before the District Judge and vitiate his report. That objection is that the Judge was wrong in considering the judgment or the evidence in the Civil Suit, that the proceedings in the suit were not admissible in evidence at all in the inquiry under the Legal Practitioners' Act which he contended was in the nature of a Criminal trial and that the charges should have been established by evidence adduced at the enquiry. He argues that a Judgment is not admissible in evidence in any judicial proceeding except in the cases covered by sections 40, 41 and 42 of the Indian Evidence Act, and that none of these sections is applicable to the present case. This contention I am entirely unable to accept. *In the matter of Rajendro Nath Mukerji*[1] a pleader who had been convicted of fraudulently using as genuine a document which he knew to be forged was proceeded against for misconduct under paragraph 8 of the Letters Patent of the Allahabad High Court. That Court not only regarded the Judgment convicting the pleader as good evidence of his misconduct but refused to allow the propriety of the conviction to be questioned at the inquiry, and removed his name from the rolls of

1. (1899) I. L. R. 22 A. 49.

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the Court. The Judicial Committee of the Privy Council upheld its procedure. Counsel who appeared for the pleader before the Privy Council did not indeed question the admissibility of the Criminal Judgment in evidence but merely contended that the Court would not in consequence necessarily disbar him and that the learned Judges of the High Court went too far in not allowing the propriety of the conviction to be questioned which Counsel maintained was not justified either in law or in fact. The Privy Council dealing with this argument observed "It is plain that the object of the present appeal is to have the judgments of the Sessions Judge and of the High Court on appeal reviewed and reversed in substance if not in form. This ought not to be allowed. In effect the apppellant would indirectly have an appeal against the conviction when if he had petitioned for leave to appeal against it the leave would certainly have been refused." These observations shew that their Lordships treated the conviction as conclusive evidence of the offence of which the pleader had been convicted. Their Lordships refer to the Judgment of *Lord Mansfield* in *In re Brounsall*[1] where that learned Judge observed with reference to proceedings taken against a solicitor who had been convicted of stealing a guinea. "This application is not in the nature of a second trial or new punishment, but the question is whether after that conduct of this man (that is in stealing the guinea, it does not say when, where or how) it is proper that he should continue a member of the profession which should stand free from all suspicion ....and it is on this principle that he is an unfit person to practise as an attorney." *Lord Mansfield* evidently appears to have regarded the conviction as evidence of the man having committed the offence of theft. Mr. Rangachariar contends that the case before the Allahabad High Court and the cases referred to in the Privy Council Judgment therein are distinguishable from the present case, for in those cases the practitioner had been convicted of a serious criminal offence and that such a conviction apart from the question of his being really guilty of the offence or not, would be a sufficient ground for his being regarded as unfit to be a practitioner in a Court. It is no doubt true that a conviction for felony or other serious offence has been regarded as a sufficient ground for punishing a solicitor or an advocate for misconduct, and section 12 of the Legal Practitioners' Act recognises and gives effect to this view. But what is the principle underlying it? The conviction itself is certainly not misconduct on the part of the pleader convicted. Can it be said that whether the pleader be guilty or not, he having been subjected to the infamy of a conviction he must be further punished by the

1. (1778) Cowper's Report 829.

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Court in its disciplinary jurisdiction over its practitioners? I do not think that this is the reason for punishing a pleader. The Court is not bound to, nor does it always altogether remove a pleader from the exercise of his profession on the ground of his conviction of a criminal offence. It may inflict a lighter punishment by suspending him for a period. If the infamy due to conviction be the ground of puuishment one would suppose that if it makes him unfit to practise he must be regarded as unfit to do so for ever and not for a period only. But as already observed the Court, having regard to the gravity of the offence, the extenuatiug circumstances, if any, and taking all the facts of the case into consideration, has the power in the interests of the public and of the profession to award such punishment to the pleader, or no punishment at all. I am of opinion that the reason for punishing a person who has been convicted is that the conviction is good evidence of the commission by the pleader of the offence in question. But assuming that the conviction itself is regarded as good cause for punishing the pleader, would not a similar principle apply where a Civil Court has found the pleader guilty of grave misconduct which requires that he should be dealt with by the Court under its disciplinary jurisdiction? I see no reason why it should not. The principle would of course not apply where the conduct of the pleader was not the direct issue in the Court which found him guilty of misconduct but only arose incidentally in a litigation between other parties. Such was the case in *In re Lubeck.*[1] In this case the suit related to the very misconduct charged against the pleader in the present proceedings and I see no reason for holding that the Judgment and the proceedings in the civil suit are not admissible in evidence. With respect to the contention that the judgment would not be relevant on the question of the pleader's guilt under any of the sections of the Indian Evidence Act, I do not think it presents any serious difficulty. It appears to me on the other hand to be a rather bold argument to urge that the finding in proceedings against the pleader in which the question was exactly the same as at the present enquiry should be regarded as irrelevant. There is no reason why it should not come within the provisions of section 11 of the Indian Evidence Act which lays down that "Facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

I have more doubt whether the finding of the Civil Court can be regarded as conclusive. In a criminal trial the guilt of the accused has to be proved by the prosecution beyond all reasonable

1. (1905) I. L. R. 33 C. 151.

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doubt and a Court convicting a pleader of a criminal offence must be taken to have found the offence proved conclusively against him. But in a civil suit the finding on the issue does not proceed on the conclusiveness of the evidence adduced on either side but on the balance of the evidence adduced on both sides. It might for instance be said that in this case the District Judge could not be held to have decided in the civil suit that the plaintiff had proved by his evidence beyond all reasonable doubt that the pleader had agreed to defend the plaintiff in the Sessions Court and that he had been paid his fee for doing so. It is unnecessary to decide this precise point in this case, for the District Judge did not treat his own previous judgment in the civil suit as conclusive against the pleader, but allowed him to adduce any evidence he might choose. No complaint has been made before us that the pleader was not allowed to let in any specific evidence or that he was prevented from further cross-examining any particular witness examined in the civil suit on any specific matter. I must therefore disallow this objection of Mr. Rangachariar.

The learned vakil reviewed the evidence adduced in the civil suit and the fresh evidence adduced at this inquiry at considerable length and attempted to shew that the findings of the judge cannot be sustained. I have given to both the evidence and to Mr. Rangachariar's arguments the anxious consideration which any case against a professional gentleman deserves, but I am unable to differ from the conclusions of the judge. I do not consider it necessary to repeat the reasons given by the judge in his careful and elaborate judgment and shall only deal with the principal points urged by Mr. Rangachariar. The first question for decision is whether the pleader undertook to defend Muni Reddi at the Sessions trial also, or whether he merely agreed to put in a bail petition so far as the Sessions court was concerned.

[The learned Judge then considered the evidence on the point and held that he had no hesitation in coming to the conclusion that the pleader agreed to defend Muni Reddi in the Sessions Court also.]

Mr. Rangachariar's next contention is that assuming that the engagement included Muni Reddi's defence in the Sessions Court, as the whole of the pleader's fee was not paid but only Rs. 268 out of Rs. 350, the pleader was absolved from the duty to appear in the Sessions Court. Here again the pleader starts with the initial difficulty that Exhibit B2 furnishes evidence against him in his own handwriting. * * * * * *

I must hold on the evidence available to the Court that the sum

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of Rs. 95 was paid to the pleader. Having regard to this finding it is unnecessary to deal with the further question whether the non-payment of a portion of the fee would absolve the pleader from his duty to appear for the client. In the absence of an agreement that the fee promised should be previously paid, it is to say the least very doubtful whether a plea of non-payment of part of the fee would be of any avail. * * * * * *
A client is not generally in much haste to take proceedings against a pleader of standing. It may be that Muni was prompted by others to make his complaint, but in the circumstances I do not think that any inference adverse to the truth of Muni's case can be drawn from his delay. I therefore hold it to be satisfactorily proved that the pleader after undertaking the defence of Muni at the Sessions trial and receiving payment for it deliberately failed to make any arrangements for the defence on a false plea that he had not agreed to conduct the defence at the Sessions trial.

Mr. Rangachariar argued that if it should be found that the pleader did undertake to appear for Muni in the Sessions Court, his default must have been due to forgetfulness on his part as he had arranged for his other cases during his absence. The District Judge was inclined to take this view in his judgment in the Civil suit but this view is absolutely inconsistent not only with the pleader's own contention both in the civil suit and at this inquiry but also with the evidence of his brother that he told Muni Reddi on the 14th October 1908 that the pleader had not agreed to defend him at all in the Sessions Court. It is very difficult to believe that a Sessions Case of so grave a nature in which the pleader had appeared in the Magistrate's Court would have been forgotten. In Civil Revision Petition No. 321 of 1911 preferred by the pleader against the judgment of the Judge in the Civil case, his counsel stated that the pleader might have forgotten the engagement. As this was inconsistent with the case that his engagement did not include the Sessions trial Mr. Rangachariar was asked to explain the inconsistency and the Court was told that the statement in the memorandum of Civil Revision Petition was made by Counsel without instructions. In the circumstances I am unable to accept the suggestion made as a last resort that forgetfulness might have been the reason for the pleader not arranging for the defence.

It is argued for the pleader that even if all the facts are found against him they amount only to negligence and that the pleader cannot be punished for mere negligence not amounting to fraud. I am of opinion that what is proved amounts to something worse than

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negligence; nor am I prepared to accept the contention that a pleader who is wilfully and grossly negligent in the discharge of his duties cannot be punished for his misconduct in the exercise of our disciplinary powers. The pleader was not guilty of a mere omission to do his duty in this case. He repudiated the agreement into which he had entered with his client and he did so deliberately and without justification. I cannot say that this amounts to anything less than fraudulent conduct on his part.

A passage in Cordery on Solicitors, page 180 was referred to on behalf of the pleader. I do not think that that passage lays down anything more than that it is not all negligence which would furnish a cause of action to a client that would be punished by the court. Certainly that is so. For instance a pleader may not have acted with sufficient diligence in the discharge of his duties. He may not have instructed himself in the facts or the law of a case as he should. He may have acted contrary to the client's instructions in some particular matters, or he may have acted without instructions. In such cases the Court would generally be content with leaving the client to his remedy in an action for damages. But negligence may also be so gross and amount to such a violation of the duties of a pleader as an officer of the Court and to the litigant and as a member of a responsible and honourable profession as to require that the Court should punish him in the exercise of its powers over its officers. The rule to be followed has been very recently laid down by the Judicial Committee of the Privy Council in its judgment in a case in which a vakil of this Court was concerned. See the judgment dated 20th June 1912 in the matter of *G. Krishnaswami Aiyar*[1] In that case the pleader was acquitted of all direct and personal fraud, but he was found guilty of not exercising any control over his clerks who omitted to discharge their duties and wrote false letters to the client and misled him, and of a grave omission in not informing the Court and the client of the true state of things after he had discovered the improper conduct of his clerks.' Lord Shaw in delivering the judgment of the Privy Council observes "Their Lordships while not interfering, as stated, with his acquittance of direct and personal fraud, do not see their way to acquit him of conduct in the management of the appeal and of his client's affairs which caused the procedure of the Court to be the very opposite of what all such procedure should be, namely, first, responsible, secondly, orderly, and thirdly, pure. In all these respects there has been a violation of the proprieties which attach to legal procedure." And their Lordships expressed the hope

1. (1912) 23 M. L. J. 114.

that the vakil in the management *by those under him* of affairs committed to his charge, would in future, see to it, that such improprieties as those referred to do not recur.' These statements clearly show that their Lordships were of opinion that gross negligence which interfered with the responsible, orderly and pure conduct of proceedings in Court would be punishable. The same rule has been laid down in America. "Professional misconduct or neglect of duty as an attorney is a good ground for suspension or disbarment."—Cyclopedia of Law and Procedure, Vol. IV page 911. The jurisdiction of the Courts in punishing improper conduct on the part of pleaders is expressed in very wide terms in the Legal Practitioners' Act. Section 13 Cl. (*f*) provides that a pleader may be punished for any other reasonable cause. It is not in the interests of clients whose interest pleaders are bound to protect, or of the profession to which they belong, or of the pure administration of justice, to attempt to define exhaustively the different kinds of misconduct which are punishable. Any conduct which contravenes the orderly and pure administration of justice would be within the disciplinary jurisdiction of the Courts. The pleader in this case is a person of long experience, and his defence to the charges against him has only aggravated his misconduct. It is not necessary to deal separately with the charge that he made a false defence in the civil suit. I wish to say nothing which would deprive pleaders of the privileges in the conduct of their own suits which other litigants possess. But it is impossible not to regard the pleader's defence as a serious aggravation of his prior misconduct.

I agree with the learned Chief Justice as to the punishment that should be imposed on the pleader.

Referred Case No. 10 *of* 1912.

The charges against the pleader are (1) that he trafficked in a litigation by purchasing it as cheap as possible in others names and (2) that he traded in cotton in the names of K. V. S. Ramachander and Co.

Ag. Advocate-General (J. L. Rosario)—The defence on the first charge is that the arrangement was made so as to secure payment of fees, while as a fact the evidence shows that fees were already paid. The Advocate-General then dwelt on the evidence.

[*Sundara Aiyar* J.—Is this an actionable claim ?] Yes. See Ss. 3, 136, 137 of T. P. Act—This particular suit was based on a promissory note; even if it had been originally negotiable it ceased to be so after the suit was filed long before the T. P. Act; *Goshain*

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v. *Chinghun* [1] pronounced it to be inexpedient for a pleader to buy decrees.

[*Sundara Aiyar* J.—Is not the law this. A purchase by a pleader must be above board and if the purchase is assailed by the vendor the pleader must show it to be very fair? But here the vendor does not dispute it.] The law is so.

T. Rangachariar: Unless the evidence establishes that the pleader has an interest in the purchase he cannot be held guilty—The evidence was then referred to. There is no evidence to show that half the profits was bargained for. After an action is filed on a claim, the claim ceases to be an actionable claim; for the claim is merged in the suit. If the evidence merely throws some suspicion against the pleader that is not sufficient to inculpate.

[*Sundara Aiyar* J.—Supposing he bought the litigation, what do you say to S. 136 T. P. Act, which says that no pleader shall buy any litigation?] There has not been any case in which it has been held that it is professional misconduct. Unless his interest does conflict with his professional duty he cannot be held guilty.

The Advocate-General on the second charge. This charge that he trades is practically admitted. It is against the rules of the High Court whose sanction has not been obtained.

T. Rangachariar.—This is a longstanding family trade in which the pleader does not do any work himself though he is a member of the family and as such a partner. No time of his is spent therein. Other members, paid agents and servants only carry on the trade. It is not a trade which he originated. If at all he takes any part it is only occasional supervision in times of leisure. The spirit of the rule shows that wholesale attention to trade on other business inconsistent with the due discharge of one's profession is the thing aimed at [*Sankaran Nair* J. Refer to *In re a Solicitor Exparte Law Society*[2]]. That case dealt with a wrong method of obtaining professional work by being a member of a mercantile firm whose cases were conducted through him.

[*Sundara Aiyar* J.—That case shows that even financing cases filed for collecting debts in which he was interested is unprofessional.] *T. Richmond* referred to *Chinnarappa* v. *Thimma Reddi*[3] omission to report is misconduct.

K. Srinivasa Aiyangar for the Vakils' Association submitted that there was a difference in the wording of the definition of action-

1. (1870) 2 N. W. P. H. C. 46.
2. (1912) 1 K. B. 302.
3. (1910) 21 M. L. J. 559.

able action before and after the amendment of the Transfer of Property Act in 1900 that this was an actionable claim which came within the prohitition of S. 136, that the violation thereof rendered the Vakil guilty of unprofessional conduct though not of professional misconduct.

As to carrying on trade, or business a prohibition of trade or business in general will exclude many an unobjectionable profession. I refer to a note in 9 M. L. J. p. 130. It will be unprofessional if personal attention is bestowed for it will interfere with one's professional work, and the trade generally or the particular trade will lower the profession in the estimation of the public: [*Sankaran Nair* J. Why not leave the whole matter in the hands of the High Court as rule 27 stands now, in which case the High Court will be able to decide on each application to trade, as it arises. That would be better in the present state of the development of the society] Some trades are *per se* bad and others not.

The Court delivered the following

Judgments:—*Sundara Aiyar* J. In this case two charges were preferred against the 1st grade pleader, first that he trafficked jointly with one Marwadi Vannajee in an actionable claim put into Court obtained by Yadalla Pichayya and Papayya against the minor heirs of one Virabhadrappa in a suit in which he was plaintiff's vakil; secondly, that he had been and was engaged in trade under the name of K. V. S. Ramchander and Co. The District Judge Mr. B. C. Smith in his report to this court has found both the charges proved. After full consideration of the evidence on record I concur in the findings arrived at by the District Judge. It is not necessary to do more than to refer very briefly to the evidence in support of the charges.

1*st charge.* On the 7th September 1909 an agreement was entered into between Pichayya and Papayya the plaintiffs in O. S. No. 3 of 10 on the file of the Subordinate Judge's Court of Bellary on the one hand and Vannajee on the other hand for the transfer of the claim of the former in O. S. No. 3 of 1910 which was then pending for a sum of Rs. 4,750. The amount claimed was about Rs. 10,000. The evidence in the suit had been recorded but judgment had not been delivered. The transferee Vannajee was to take all risk of loss in case the suit was dismissed. The 1st grade pleader represented the plaintiffs in the suit. According to the evidence of

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Papayya one of the transferors, his fee for the suit had been paid prior to the transfer. The case of the petitioner who made the complaint against the 1st grade pleader is that the transfer was wholly or partially for the benefit of the pleader himself. The most important fact proved against the pleader is that half of the profit which Vannajee made out of the bargain was paid to him.. Vannajee sold his claim to one Veerabhadrappa, the 2nd witness for the petitioner, for Rs. 6,392-8-0. The profit made by Vannajee according to himself was Rs. 1571-4-0 and of this amount, exactly one half *i.e.* Rs. 785-10-0 was received by the pleader. A sum of Rs. 70-12-0 was deducted out of the total amount of Rs. 6,392-8-0 as the interest on the loan contracted by Vannajee at 6 % per annum for the consideration paid by him for the transfer. The amount was borrowed from the firm of a banker S. Donga Chand. It is not denied that the pleader became responsible to the banker for the payment of the amount. The pleader's case is that he merely became surety to the banker for the loan which Vannajee took from him. Vannajee was the Gumastah of one Kannajee. The pleader gave a letter or chit to Vannajee addressed to the banker. This letter was dated 9th September 1909. It is stated on behalf of the pleader that the money had been paid by the banker to Vannajee on the 7th before he gave the letter. 1st witness for the petitioner, Sivaraj, a partner of the banker, states that the banker's account contains an entry dated 7th September 1909 debiting Kannaji through Vannajee with Rs. 4,000. On the 9th September the debit was transferred to the pleader, Kannajee being credited with the amount on that date. This might go to show that the pleader's connection with the loan commenced only after it was actually advanced by the banker but the inference does not necessarily follow. The reason for the alteration of the entry was that Vannajee objected to the entry in the name of Kannajee as he claimed the benefit of the transfer of the claim himself. It is quite clear that on the 9th it was agreed I that the pleader should be regarded as the person mainly responsible to the banker for the payment of the loan. Now why did the pleader agree to make himself responsible for the amount? The answer suggested by the payment of half the profits to him undoubtedly is that it was understood that he and Vannajee should go shares in the bargain. The pleader in his written statement does not give any explanation of his receipt of Rs. 785-10-0. He merely denies the allegation that he was interested in the purchase of the claim and states that there was nothing against law, rules or public policy even if he was interested in it. After the witnesses in the present proceedings were examined the pleader made another short statement

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(not on oath) and offered himself for cross-examination. He gave no explanation of the receipt of Rs. 785-10-0 in this statement either. In cross-examination he admitted his receipt of the amount (the payment being made directly to his father-in-law). He also stated " this Rs. 785-10-0 might have been partly remuneration for spending my time in negotiating the transaction and preparing the necessary documents. I have no account to show the sum due for each piece of work done." This affords no satisfactory explanation. He does not say that the whole amount was paid for his services in bringing about the transfer. He admits that the amount was not entered in his accounts as fees and gives an extraordinary explanation that only remuneration for work done in court is entered as fees in his accounts. He entered the amount under family earnings. Papayya the transferor of the claim says that he had paid to the pleader the fee due to him for the conduct of the suit. This is likely as the case was almost ripe for judgment when the transfer was made. If the amount was not paid as fees due for professional work then the payment must have been on account of a half share possessed by the pleader in the claim by virtue of the transfer. Vannajee who tries to support the pleader as much as he can is equally unable to show how the amount of Rs. 785-10-0 was made up. He tries to make out that he promised to pay the pleader his fee and a present but he could not give any explanation as to how the fee would amount to Rs. 785-10-0. He admits that that amount was paid to the pleader. He says that the interest payable on the loan was 7½ annas and not 6% so as to throw doubt on the amount available for division between him and the pleader. But he admits that the profit made out of the transaction was Rs. 1,571-4-0 and he also admits that he charged the pleader 8 annas per Rs. 100 interest on his whole account including this sum of Rs. 4,000. There is absolutely nothing to support his statement that 7½ annas and not 6% was the interest payable on the loan. In the absence of any explanation forthcoming from the pleader I have no doubt that the Judge was justified in coming to the conclusion that it was agreed between him and Vannajee that he should receive half the profits arising from the transfer of the claim. It is immaterial to consider whether he became interested in the transfer on the 7th September, or only on the 9th. The Judge's conclusion is strongly supported by the evidence of the petitioner's 2nd witness who purchased the claim from Vannajee. He states that he negotiated the purchase with the pleader without any reference to Vannajee and that the payment of the consideration was made to the latter at the instance of the former. Papayya who does not admit that the pleader had a

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share in the claim admits that the negotiations for the transfer to Vannajee took place at the pleader's house.

The next question is whether the pleader's act in purchasing the claim amounts to grossly unprofessional misconducut within the meaning of section 13 of the Legal Practitioners' Act. The claim was then the subject matter of a suit in which the pleader appeared for the plaintiff. The defendants in the suit possessed large properties but were in involved circumstances. Papayya says that it was broadly rumoured that his suit would fail and the pleader admits that his client told him that the defendants were giving out that the suit would be dismissed. There can be no doubt that the plaintiffs were apprehensive of failure. The pleader, on the other hand, was in a far better position than his client to judge of the chances of success. There can be no doubt that the transfer was a highly speculative one. There is no force whatever in the contention that the claim ceased to be actionable because a suit had been instituted for its enforcement. That fact is absolutely immaterial according to the definition of 'actionable claim' in Section 3 of the Transfer of Property Act. The old definition contained in Section 130 of Act IV 1882 and clause (d) of Section 135 as it originally stood put this beyond a doubt. Mr. Rangachariar on behalf of the pleader contends that a purchase of an actionable claim is not necessarily unprofessional conduct. Mr. K. Srinivasa Aiyangar, who appears on behalf of the Vakils' Association, supports this argument. I am quite unable to accept this contention. Section 136 enacts as follows "No Judge, legal practitioner or officer connected with any Court of justice shall buy or traffic in or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of justice shall enforce at his intance or at the instance of any person claiming by or through him any actionable claim, so dealt with by him as aforesaid." It does not merely make purchases of actionable claims by the classes of persons named in it unenforceable in law. It expressly prohibits them from being interested in any transfer of an actionable claim. The prohibition is based on the ground of the offices held by them. I cannot doubt that the doing of an act which a legal practitioner is forbidden to do on the ground that he is a legal practitioner is a violation of the conduct that he should pursue as a practitioner and therefore unprofessional conduct. It is urged that the legislature could not have intended to make the purchase of an actionable claim by a pleader under all circumstances unprofessional conduct, that in other countries there is no such absolute prohibition, that the New York Civil Procedure Code forbids purchases of actionable claims and negotiable instruments only where it is made " with the intention

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and for the purposes of bringing a suit thereon," and that in the French Civil Code the prohibition is confined to claims falling within the jurisdiction of the Court where the pleader is practising. The language of Section 136 of Act IV of 1882 is in my opinion absolutely clear. It is quite immaterial that the Indian Legislature considered it expedient to enact the rule in wider terms than the legislatures of some other countries have done. It being clear that the pleader's act amounted to professional misconduct, was it *grossly* unprofessional? I have no doubt that it was. I have already referred to the circumstances under which the transfer was made. The Court of First Instance as a matter of fact passed a decree for about Rs. 11,000 though the amount was reduced to Rs. 6,000 and odd in appeal. The purchase amounted in this case to trafficking in litigation. It is unnecessary to decide the question whether the purchase of an actionable claim though unprofessional must amount to grossly unprofessional misconduct in every case. Undoubtedly the onus would be on the pleader who purchases an actionable claim to show that in the circumstancss of any particular case it does not amount to gross misconduct. I think that it would not be improper to hold that pleaders should not be permitted to do acts that are liable to subject them to severe temptation. I am of opinion that this charge has been proved against the pleader. I agree with the learned Chief Justice as to the punishment that should be imposed.

The 2nd charge:—The facts relating to this charge are practically undisputed. The pleader belongs to a wealthy family possessed of various kinds of properties including landed estates, houses, directorships in companies, Secretaryship in one Company, an agency under the Oriental Life Insurance Co., some other trade agencies, shares in joint stock Companies and a mill at Bellary known by the name of Medum Seshanna Cotton Manufactory. The evidence of Srinivasa Row, the pleader's brother, and himself a pleader, shows that in 1894 the members of the family entered into a partnership. A fresh partnership deed (Exhibit G) was executed in 1900. According to this deed each member of the firm is authorised to sign the name of the firm, and the partners of the firm are responsible jointly and severally for the acts of the firm as well as for the acts of each partner and for monies reaching the hands of any one of them. The pleader states in his written statement "the members of the firm supervised the work of the managers and agents whenever they have leisure and during holidays." He denies that he has engaged himself in trade. In the face of the admitted facts, I am of opinion that the denial is absolutely untenable. It is contended that the actual

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work of the trade is done by clerks and agent and that therefore that pleader cannot be said to be personally carrying on trade. I am quite unable to agree that the mere appointment of servants or agents is sufficient to show that the trade is not carried on personally by the pleader. In that case any trader who is able to engage clerks and to dispense with attending to customers himself may say that he is not personally engaged in his trade. It is not denied that the agents and managers could be dismissed at pleasure by the pleader and his partners. The admission that the members of the firm supervised their work puts an end to all doubt on the matter. It is contended by Mr. Rangachariar that a pleader who belongs to a trading family should not be regarded as trading, simply because other members carry on trade, the benefit of which would go to all the members of the family including the pleader. I agree with him so far. It is quite true that every member of an undivided Hindu family cannot be said to be carrying on a trade the benefit of which would go to the family. One member of it alone may be carrying on the trade but he may do so with family funds. Although as between the members of the family the profit or the loss must be shared by all of them, it would not follow that every one of them is conducting the trade. Again two or more members may alone carry on a trade as partners and the outside public may be dealing with them alone though as amongst the members of the family *inter se* all might be responsible for the result of the trade. But if all the members enter into a partnership and carry on a family trade as partners then all of them must be regarded as carrying on the trade. This is a distinction well understood in law. In the present case the pleader who is the senior member of his family has entered into a partnership with the other members. He as much as any other member of the family is trading with the outside public whatever may be the actual amount of work done by him in connection with the management of the trade. I hold therefore that the pleader must be held to be personally engaged both in trade and in the other business referred to in the deed of partnership. It is then argued that carrying on a trade is not professional misconduct within the meaning of section 13 of the Legal Practitioners' Act and that there is Rule 27 of the rules framed under the Act is in these terms. "If any person, having been admitted as pleader, accepts any appointment under Government, becomes a student of any school or college for purpose of pursuing his studies or enters into any trade or other business, or accepts employment as a Law Agent other than a pleader, Mukhtar or Agent certified under Act XVIII of 1879 and these rules, he shall give immediate notice thereof

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to the High Court, who may thereupon suspend such pleader from practice or pass such orders as the said Court may think fit." It is true that engaging in trade or other business is not definitely pronounced to be misconduct by this rule. According to it the High Court may give permission to any pleader, if it thinks fit to do so, to engage himself in any particular trade or business. A similar rule has been framed under the Letters Patent of the High Court with respect to High Court Vakils although curiously enough no such rule has been framed applicable to advocates and attorneys. The pleader was undoubtedly guilty of misconduct in not obtaining the permission of the High Court for carrying on trade or other business. He has been engaged in trading business of an important character and it was undoubtedly his duty to apply for and obtain the High Court's permission. No charge however has been framed against him of violating the provisions of Clause 27 which require him to apply for permission to the High Court and I do not think we should find him guilty of misconduct in violating the provisions of this clause without his having an opportunity to explain his conduct. But it does not follow from this that he is not guilty of misconduct by being engaged in trade or other business without the permission of the Court, if his doing so is inconsistent with the profession of a pleader. The rule enables pleaders to avoid all risk of being pronounced guilty of misconduct by obtaining the opinion of the High Court with respect to any business they may propose to undertake but the failure to take advantage of the provisions of the rule cannot absolve them from liability to be convicted of misconduct if they act in a manner consistent with their profession. It seems to me that there are two reasons why carrying on trade may be inconsistent with the profession of a pleader. One reason is that it might prevent him from devoting that attention to his work as a pleader which his duty to the public and to the Court require that he should. But another and certainly not less important reason is that a pleader should not be permitted to engage himself in any pursuit which is inconsistent with his status as a member of a learned and honourable profession. In England every person who wishes to be called to the bar has to state that he is not and has never since his admission as a student "been engaged in trade and that he is not an undischarged bankrupt." I am not aware that according to the rules of the bar in England a Barrister can be punished for being engaged in any trade or business inconsistent with his being actively engaged in the practice of his profession, though there are various *offices* the holding of which is deemed to be inconsistent with practice as a Barrister. See page 384 of Halsbury's Laws of England Vol. II. But

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I strongly believe that carrying on a trade would be deemed to be generally inconsistent with the active practice of the profession of either a Barrister or an attorney. To do so may not be in some cases inconsistent with the status itself of a legal practitioner. He would probably not be punished for having been engaged in trade or other business if he was not practising his profession at the same time, although it is probable, I think, that there are some trades and businesses which may be regarded as altogether inconsistent with the status of an Advocate. However as the rules stand it would be open to this Court to permit any particular trade or business being undertaken by a pleader. There might certainly be some kinds of business which would in no way be inconsistent with either the status or the active practice of a pleader's profession. There have been instances where engagement even in a trade has also been permitted by this Court although I take it that this would not ordinarily be allowed. It may be that there are enterprises which, having regard to the circumstances of this country, the Court would sanction a pleader actively promoting and devoting a portion of his time to. Whether sanction should be given in any case would no doubt largely depend on the character of the trade or business and the extent to which it is likely to occupy the time and attention of the pleader. But no pleader can be permitted to derive any advantage by taking the responsibility on himself and engaging in a trade or business without the sanction of the Court. If he does so he takes the risk of its being subsequently held that this conduct amounts to professional misconduct. If permission would not have been given if he had asked for it, he must be held guilty of misconduct in having done that which the Court would not have sanctioned. This is the rule followed where a trustee acts without the sanction of the court in a matter for which he could have obtained its permission. I do not consider it possible that the court would have given permission to the pleader in this case to be engaged as a partner of a large cotton mill and in the various other businesses which the pleader admits to be included in the concerns of the partnership. It is, however, possible that he thought, as he says he did, that inasmuch as he would not have to devote much of his time personally to his work as a partner he was not acting in violation of his duty as a pleader. I am willing to believe that he acted *bona fide* and without any intention to act contrary to his duty as a professional man. I am therefore of opinion that it is sufficient to point out that he acted wrongly and that it is unnecessary to impose any punishment on him for his conduct in this matter.

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Sankaran Nair J.—I think that Mr. Rangachariar is right in his contention that any charge against the pleader must be proved by evidence taken at this enquiry. But I do not accept the further contention that the judgment in the civil suit is inadmissible in evidence. The pleader was the defendant in that suit. It was decided therein that the plaintiff had paid him his fee to appear for him at the sessions; that he failed to appear without making any arrangement for the conduct of the case: a decree was passed against him on these findings. The facts found against him must be taken *prima facie*, to be proved. At the same time I think it is open to him to show that the judgment is wrong and should not be accepted as final for the purpose of this enquiry. Any evidence which should have been but was not produced in the suit will of course be viewed with grave suspicion. Nor is it clear to me why it is not open to us at this enquiry, to consider whether the judgment is right on the materials on which it was based. There is no law preventing us from doing so, and I see no injustice in it.

I think therefore the Judge is right in allowing the pleader to give further evidence. On the evidence Exhibit A the receipt given by the pleader to Muni Reddi makes it clear that he was bound to defend him at the Sessions. I doubt whether it is open to him to say in this enquiry after giving that receipt, unless he proves mistake or some other invalidating circumstance, anything against that receipt. Because as a pleader it was his duty to grant a proper receipt and not one which is misleading. He has however failed to prove that he did not agree to appear at the Sessions. I do not attach any weight to the other contention that the vakil was not bound to appear as his client owed him a portion of his fee. He has failed to prove that any balance is due.

I am also of opinion that a vakil is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to the effect to the client in sufficient time to enable him to make other arrangements.

Mr. Rangachariar argues that a pleader like Mr. Venkata Row would not have failed to make some arrangement about his case before going to Rangoon. There is great force in this argument. Mr Venkata Row appears to have made arrangements about all other cases. The only explanation that suggests itself to me is that he may have really thought that he was not bound to appear for Muni Reddi at the Sessions. This is supported by the facts that the

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counterfoil of the receipt kept by him showed that he was to appear only before the Magistrate and this Srinivas Row told Subba Row that Mr. Venkata Row was not engaged to defend Muni Reddi. What took place at the meeting in September between Muni Reddi and the vakil also supports this view. I think that Venkata Row believed that he was not engaged to defend Muni Reddi at the Sessions. If he had pleaded in this enquiry after the disposal of the appeal, that he acted in this erroneous but honest belief and tendered a proper apology, speaking for myself, the result might have been different. But he has persisted in this enquiry in trying to prove a defence already found false in a Civil Suit. I agree accordingly to the order which will be pronounced by the Chief Justice.

Referred Case No. 10 of 1912.

The charge against the pleader Mr. Venkata Rao is that he purchased the claim of the plaintiff in Original suit No. 8 of 1909 on the file of the Subordinate Judge's Court of Bellary. That was a suit brought by Pichayya and Papayya against certain minors for the recovery of a sum of more than Rs. 11,000. After evidence had been heard, but before judgment was pronounced one Vannaji agreed to purchase the claim of the plaintiffs therein for Rs. 4,750 on 7th September 1909. Now, it appears from the evidence of the vendor, who is the prosecution 4th witness in the case, that so far as he is concerned he had nothing to do with Mr. Venkata Rao, and that, though the negotiations for the sale took place in Venkata Rao's house, the claim was agreed to be sold to Vannaji who was his client without any consultation with Venkata Rao. Vannaji borrowed Rs. 4,000 of this amount from the firm of Satraji Dongerchund. Anadaji who was examined as a witness for Venkata Rao was a partner in that firm. It appears from his evidence, which there is no reason to disbelieve, that when the firm lent Rs. 4,000 to Vannaji, the amount was debited against one Bhataji Khemaji who was the principal of Vannaji; two days later Vannaji told this witness that it should have been debited against him and not against his principal; he refused to do so; then Vannaji got a letter from Mr. Venkata Rao asking him to debit that amount against Venkata Rao's account and that was accordingly done. Mr. Venkata Rao admits having written a letter to the firm asking them to do so. The entry was made by the prosecution 1st witness and he also gives evidence to the same effect.

On the 7th of December, Vannaji sold the decree to one Veerabhadrappa. Veerabhadrappa was a relative of the defendants in that suit and was naturally interested in them. He says that he heard a rumour that Mr. Venkata Rao had purchased that decree and that he spoke

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to him and arranged to purchase the decree from him; he paid Rs. 6,392-8-0 to Venkata Rao and got an assignment of the decree from the original decree-holder Papiah who had agreed to sell it to Vannaji. The money was actually paid to Vannaji as Venkata Rao directed him to do so. According to this witness he never saw Vannaji at all while the negotiations were going on. If the matter had stopped here the case would have been one of suspicion only.

But there is the following additional circumstance to be taken into consideration. The entire amount borrowed by Vannaji was Rs. 4750. Now, this with interest at 6 per cent. per annum for three months, that is the period between September 7, the date of agreement of sale to Vannaji and December 7, the sale of the decree to Veerabhadrappa, would come to Rs. 4,821-4-0. The difference between the two amounts Rs. 6,392-8-0 and Rs. 4,821-4-0 *i. e.*, 1,571-4-0 is the profit and half of this is Rs. 785-10-0.

Now, it appears from the evidence and it is admitted that this amount, *i e.*, Rs. 785-10-0, was paid on Venkata Rao's account to his father-in-law. It is not explained how this particular sum of exactly half of the profits was due to Venkata Rao. He gives no explanation, he produces no account to show that this was due to him for any fee. There is evidence that the interest payable on the sum of Rs. 4,000 was at 6 per cent. The evidence as to the rate of interest payable on the remaining Rs. 750 is discrepant and it is not clear what the real interest was; but there is nothing improbable in their setting apart interest at 6 per cent. for 3 months for the purpose of calculating profits on the transaction. In the absence of any explanation on the part of Venkata Rao the only conclusion that we are justified in drawing is that he received it as his share of the profits of the transaction; and taken with the other circumstances of the case his advancing the money to Vannaji and the facts disclosed by the prosecution 2nd witness whose evidence is strongly corroborated by these two facts, I come to the conclusion that from the 9th September 1909 Venkata Rao must be treated as a partner with Vannaji and equally interested with him in the decree.

The question then remains for consideration whether this is grossly improper conduct in the discharge of professional duties.

An actionable claim should not be purchased by a pleader and in my opinion the purchase of a claim after suit offends against public policy more than the purchase of such a claim before suit. It is trafficking in litigation and when the vendor is the client of the purchaser, the transaction in the majority of cases is likely to be

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oppressive to the client. In the case before us, however, not only no undue advantage has been taken but Venkata Rao seems to have acted fairly. Papiah offered to accept Rs. 4,000 from Veerabhadrappa in full satisfaction of his claim and he got from Vannaji and Venkata Rao Rs. 4,750. Further Venkata Rao did not deal with the client and was not in fact the original purchaser on the 7th. It is also proved that a portion of the interest due to the minor was remitted. As this is the first case of the kind that has come before this court, a lenient view might have been taken of the case, if he had pleaded good faith and placed before the Court all the facts. He has not chosen the course. I agree to the order which will be pronounced by his Lordship the Chief Justice.

The next charge against Mr. Venkata Rao is that he has been trading in cotton and yarn with the other undivided members of his family as partners. That he is a partner with them is proved beyond doubt by Exhibit G. The Company has also bought a spinning mill in Bellary, borrowed money to pay for it and to cover working expenses; it was buying cotton and selling yarn. There are no doubt, managers and gumastas appointed but Venkata Rao and his brother do not cease to be persons carrying on trade any the less on that account. Holding then, that Venkata Rao and his brothers are traders, the question remains whether he is guilty of any grossly unprofessional conduct. Rule 27 of the rules framed by the High Court under the legal Practitioners' Act XVIII of 1879, runs thus:—

"If any person, having been admitted as pleader, accepts any appointment under Government, becomes a student of any school or college for purposes of pursuing his studies or enters into any trade or other business, or accepts employment as a Law Agent other than a pleader, mukhtar, or Agent certified under Act XVIII of 1879 and these rules, he shall give immediate notice thereof to the High Court, who may thereupon suspend such pleader from practice or pass such orders as the said Court may think fit.

"Provided that when a pleader is appointed by or under the authority of the High Court to the office of District Munsif, whether temporarily or permanently, it shall not be necessary to give the notice prescribed in the first part of this rule; but no pleader, while employed as District Munsif, shall be permitted to practise or do any business as a pleader before any Court."

Now it will be noticed that the High Court can take action under this rule only if the pleader who enters into any trade or business gives notice to the High Court. Under the rule he is bound to give such notice. Then, section 13 of the Act itself empowers the

High Court to punish the pleader in certain circumstances. The words of the section run thus :—" The High Court may also, after such enquiry as it thinks fit, suspend or dismiss any pleader holding a certificate as aforesaid.

(*b*) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or

(*f*) for any other reasonable cause."

The omission to comply with rule 27 by a pleader would probably come under clause (b). It would certainly come under clause (f). If, therefore, a First Grade Pleader omits to make the application which he is bound to submit to the High Court under rule 27, then he may be suspended under Section 13 for breach of that rule until he makes the application under that section or any further time the High Court thinks fit. If he makes the application under rule 27, then he can be dealt with under that rule. Apparently therefore the rule and the section provide adequate remedy for all cases. Whether the pleader should be suspended or should be allowed to carry on a trade under Rule 27 depends upon the particular circumstances of each case: the character of the person making the application, the nature of the trade or business, the time that the pleader would have to devote to it. There may also arise other considerations. The trade or business may be one which it may be in public interests to foster in that locality and men other than pleaders may not be available perhaps to carry on the trade or business satisfactorily. Under this rule, applications are being made to the High Court for sanction and they have been granted or rejected according to the particular circumstances of the case. If we lay down a definite rule under section 13 of the Act, it would be depriving the High Court of the discretion vested in it by rule 27; for, it is obvious that once a pleader is declared to be disqualified from engaging in any trade or in any particular kind of trade, it would not be right for the High Court to give any sanction under rule 27 to any other pleader applying for it. I am not therefore able to say that under Section 13, the High Court should declare that it is unprofessional for a pleader to follow any trade or business. It is not required by the conditions of the Legal profession or the circumstances of the country.

It may be a question whether any rule even is necessary, because the evil to be guarded against cannot be serious as the sanads of the First Grade Pleaders have to be renewed every year and the High Court may refuse a renewal. But, in any event, I do not think it

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necessary that we should take any action under section 13 as against any pleaders to whom rule 27 is applicable. I am also of opinion that it is difficult now to say generally that a pleader should not engage in any trade or business. Confining myself now only to Vakils they exercise the profession both of the Advocate and the Solicitor and they should not be debarred from performing those functions which a Solicitor is, and a Barrister may not be, entitled to discharge. Many, if not the majority, of the pleaders are members of joint families who are engaged in trades or businesses. It would be an unnecessary interference with them now to declare that such trades or businesses are unprofessional. The notion that no trade however honestly carried on is worthy of a Vakil is a relic of the times that have passed away, and I should regret its introduction into India.

On the facts before us, there is no doubt Mr. Venkata Rao has been guilty of a violation of rule 27 in not having reported to the High Court his connection with the firm or with the mill. But he has not been charged with having violated that rule and we cannot take any notice of it as he has had no opportunity of making any answer to that charge. So far, therefore, as the second charge is concerned I am not prepared to inflict any punishment on him.

Referred Cases Nos. 9 and 10 of 1912.

The Officiating Chief Justice:—I concur with the conclusions arrived at by my learned brothers in the judgments which have just been read, and which I have had the advantage of perusing.

With regard to the charge in connection with the Criminal Case against Muni Reddi, I am unable to accede to Mr. Rangachariar's contention that the judgment and evidence in the Civil suit against the Pleader, Mr. Venkata Rao, is not admissible as evidence against him in the present proceedings. The question in that suit was the very question which we now have to decide, *viz.*, whether he engaged to defend Muni Reddi in the Sessions Case and failed to do so without any valid excuse. Mr. Venkata Rao was the defendant in the case and the decision was against him.

I do not think that the decision is conclusive proof against him in the present proceedings, but it has not been treated as conclusive. He has been allowed in the present proceedings to produce further evidence in support of his defence and he has produced it, and it has been duly considered by the District Judge and by us. There is no suggestion that any evidence which the pleader wished to adduce in

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the present proceedings has been shut out. We have not been referred to any authority for holding that the judgment is inadmissible in the present proceedings as establishing a *prima facie* case of unprofessional conduct against the pleader or for holding that we are precluded from considering whether the judgment is right on the evidence on which it was based, nor do I see any ground in reason why we should treat them as inadmissible.

On the merits, the evidence and probabilities in all these cases have been so fully considered in the judgments of the two District Judges and of my learned brothers that I do not think anything would be gained by my reviewing them afresh. I entirely agree with the conclusions at which my learned brothers have arrived.

I do not understand how it can be seriously argued that what the pleader is said to have purchased from the plaintiffs in Original Suit No. 3 of 1909 was not "an actionable claim," and that there was nothing contrary to law or public policy in his purchasing it, if he did do so, and, therefore, his doing so was no professional misconduct. The plaintiff's claim had, no doubt, been put in action, but that did not render it the less an "actionable claim" as defined in section 3 of the Transfer of Property Act. The claim was still *sub judice*. Though the case was ripe for judgment it had not been given. The claim had not become merged in a decree. Section 136 of the Transfer of Property Act in the most stringent terms declares that "no judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in or stipulate for, or agree to receive, any share of, or interest in, any actionable claim." A pleader holds a privileged position in connection with the administration of justice, and the law imposes on him certain restrictions and disabilities by reason of the position or office which he holds, and in order to safeguard the interests of litigants and the pure administration of justice.

It is, I think, futile to contend that it is not professional misconduct for a man to do that which the law expressly forbids him to do by reason of the profession which he exercises. The degree of misconduct will, no doubt, vary with the circumstances of each case, but I cannot doubt that a transaction such as that with which we are now concerned amounts to gross misconduct. The pleader who is conducting a case is in a better position than his client to judge of the probability of his success or failure, and the nearer the case is to judgment the greater will be his opportunity for correctly anticipating the event. It may be that when a case is ripe for judgment there is no longer any temptation to the pleader to conduct the case improperly, but to allow him at that stage to purchase his clients's claim

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would expose him to a strong temptation to misrepresent to his client his prospects of success and the value of his claim. In the present case the transaction was a highly speculative one. The evidence shows that the plaintiffs feared their suit would be dismissed and were willing, at one time to sell their claim for Rs. 4,000. They in fact, got a decree for Rs. 11,000 in the Original Court, though this was reduced on appeal to Rs. 6,000. It is true there is no suggestion that the pleader made any misrepresentation to his elients in this case, and the plaintiffs were satisfied with the price (Rs,4,750) paid to them, but this does not prevent the pleader's purchase of the claim, in defiance of the express provisions of law, from being professional misconduct of a very grave character.

It only remains for me to state the decision at which we have arrived as to the penalty we should impose under S. 13 of the Legal Practitioners' Act on Mr. Venkata Rao in respect of the charges which have been established against him. He cannot plead youth or inexperience in extenuation of his misconduct. Its gravity has certainly not been lessened by the false defences which he has put forward and maintained throughout in regard to the charges relating to his conduct in connection with the criminal case against Muni Reddi, and in purchasing his own client's claim in Original Suit No. 3 of 1909 in the Subordinate Judge's Court. We do not think that a mere warning or censure would suffice to mark our sense of the gravity of his misconduct in either of these cases. We think that we are required to impose a penalty of a substantial period of suspension in each case. We accordingly direct that Mr. K. Venkata Rao be suspended from the exercise of his profession as a pleader for six months and three months on account of his misconduct in regard to these two cases respectively, the two periods to run consecutively.

We do not think it necessary to impose any penalty in connection with the charge against him for engaging in trade. We think it sufficient to say that he was wrong in carrying on trade without reporting the fact to the High Court under Rule 28 of the Rules made by the Court under the Legal Practitioners' Act 18 of 1879.

The pleader will have to pay the costs of the Petitioner in Referred Case No. 10 of 1912.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Wallis.

Velayudan Chetty ... **Appellant In S. A. No. 623 of 1907 (1st Defendant and his legal representative.*

v.

Alangaram Chetty and others... *Respondents.*

Velayudan Chetty v. Alangaram Chetty.

Transfer of Property Act, Ss. 60, 61—Partial redemption when allowed?—Consolidation of mortgages—Essentials.

A mortgage is one and indivisible and the general rule is that there can be no partial redemption except in cases where the mortgagee, or, if there are more mortgagees than one, all such mortgagees have acquired in whole or in part the share of a mortgagor.

To allow a claim of consolidation of two mortgages it is necessary both under the Transfer of Property Act and otherwise that both should become united in title and come into the same hand.

Pledge v. *White* [1] *Riley* v. *Hall* [2] referred to.

Second appeals from the decree of the Subordinate Judge's Court of Madura West in A. S. Nos. 112 and 124 of 05 presented against the decree of the Court of the District Munsif of Shivaganga in O. S. No. 201 of 100.

The suit was for redemption of a usufructuary mortgage made by one Zamindar Gowri Vallabha on 30—9—1866 in favour of 3rd defendant and the father of defendants 1, 2 and 4. Plaintiff alleged that after the death of Gowri Vallabha he bought the right, title, interest of his elder son who succeeded to the Zamindari in all the suit properties in a court sale in the year 1896. 1st defendant contended that he had a prior hypothecation of items 1 and 2 20th August 1863 which by its terms was to ripen into usufructuary mortgage at the end of three years in case of default of payment of hypothecation amount by that time, that he was accordingly in possession in virtue of that right also, having sued and obtained a decree for possession, that even if the later mortgage is now paid by the plaintiff he cannot be ousted from his possession under that mortgage, that he was entitled to be paid the amount of that mortgage also as per section 61 of the Transfer of Property Act, that he had bought in 1897 the one-third interest of the second son of the mortgagor in items 1 and 2. The 10th defendant pleaded that the Zamindari was impartible and that as the impartible Zamindar's interests in items 1 and 2 was bought by him in court auction in

* S. A. Nos. 623 and 669 of 1907. 11th April 1912.

1. (1896) A. C. 187.

2. 79 L. T. 244.

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1869 the plaintiff had no title to redeem them. The lower courts without deciding that question whether the Zamindari was partible or impartible held that as the plaintiff was admittedly the owner of some of the suit properties he was entitled to redeem the whole, that the principle of tacking did not apply and that the shares of the parties could be determined in a separate suit.

Against the decree 1st and 10th defendant preferred a second appeal.

N. Rajagopalachariar for appellant.

S. Srinvasa Aiyangar for respondents.

N. Rajagopalachariar, first, on behalf of the 10th defendant. The question of partibility or impartibility must be determined in this suit for if it be impartible plaintiff would have no title to redeem items 1 and 2 which were already bought by the 10th defendant. Secondly on behalf of the 1st defendant; Where a mortgagee is also the owner of a part of the mortgaged properties the mortgagor is not entitled as against the mortgagee's wish to redeem that property which is in the possession of the mortgagee. Ghose on Mortgages 248. See *Nawab Ajimut Ali Khan* v. *Jowahir Singh,*[1] *Kallan Khan* v. *Moideen Khan,*[2] *Surjiram Marwari* v. *Barham Deo Pershad,*[3] *Grish Chunder Dey* v. *Jurumoni Dey.*[4] In such cases the Madras High Court has held that the suit should be dismissed because the plaintift had not previously ascertained his share by a partition; see *Manu* v. *Kuttu.*[5] *Thillai Chetti* v. *Ramanuja Iyengar.*[6] I do not claim a dismissal in this case. I conceded that the share of the plaintiff may be ascertained in the suit itself. If the plaintiff is allowed to redeem the whole now, I will have to bring another suit for redeeming him. This must be avoided under section 61 of the Transfer of Property Act, I am entitled to be paid the amount of prior mortgage as some of the properties are identical in both.

S. Srinivasa Aiyangar for respondents. The principle in *Nawab Azmut Ali Khan* v. *Jowahir Singh*[7] applies only to a case where the partial interest is acquired not by one of several mortgagees but by all the mortgagees or by the mortgagee if there be only one. This distinction is based upon the doctrine of merger or fusion of interest in one and the same person. A merger can take place only where both the interests are combined in one and the same person or persons. It is upon this principle that section 60 of the Transfer of

1. (1870) 13 M.I.A. 404 at p. 415 and 416. 2. (1905) I. L. R. 28 A. 155.
3. (1905) 2 C. L. J. 202. 4. (1970) 5 C. W. N. 83.
5. (1882) I. L. R. 6 M. 61. 6. (1896) I. L. R. 20 M. 295.
7. (1870) 13 M. I. A. 404.

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Property act is based. See also Ghose on Mortgages page 247 *Mahtale Rai* v. *Sant Lal*[1] see the last four lines in *Kallan Khan* v. *Mardhan Khan*[2] and also *Mora Jhoshi* v. *Ramachandra*[3]. The principle is in indivisibility of mortgage on either side *Asan Kuthar Sahab* v. *Ramanath Chetti,*[4] *Hall* v. *Heward*[5]. Tacking cannot take place unless both the mortgagees are identical. It is not so here. Coote on Mortgages pp. 881 and 882. Ashburner on Mortgages, 362; *Riley* v. *Hall.*[6] As for the first mortgagee having taken possession of some of these lands after three years the finding is otherwise. So he cannot insist on retaining possession under the first mortgage. As for the 10th defendant whatever his right is as to items 1 and 2 the plaintiff is entitled to redeem the mortgage under section 91 of the Transfer of Property Act leaving the 10th defendant to work out his rights under section 95.

N. Rajagopala Chariar in reply. None of the cases relied on is one in which redemption has been ordered against the will of the mortgagee under such circumstances. The distinction drawn against one only of the several mortgagees who acquires a portion of the equity of redemption being entitled to insist has not been found against in any decided case and is against the above Privy Council decision which is general. In all the cases quoted the mortgagee did not acquire a portion of equity of redemption. Section 61, does not say that the mortgagees must be identical in every respect. No such words can be read into the section. Even if the prior mortgagee did not obtain possession under the first mortgagee he cannot be ousted from his present possession in violation of the mortgagor's covenant to give possession. The mortgagor cannot be allowed to take advantage of his own wrong.

The Court delivered the following

Judgment:—This is a suit to redeem a mortgage effected by the late Zemindar of Varappur in favor of Defendant 3 and of the fathers of defendants 1, 2 and 4. Portions of items Nos. 1 and 2 of the mortgaged properties were sold in execution of decrees obtained against the Zamindar in 1866 and 1867 and now belong to the 10th defendant. In a suit of 1884 the plaintiff obtained a decree against the Zemindar's elder son and in execution acquired the elder son's share of the mortgaged properties in so far as it had not been already alienated. The plaintiff's case is that the estate was impartible and that by his purchase he acquired the whole equity of

1. (1883) I. L. R. 5 A. 276.
2. (1905) I. L. R. 28 A 155.
3. (1890) I. L. R. 15 B. 24.
4. (1898) I. L. R 22 M. 29.
5. (1886) 32 C. D. 430. 436,
6. 79 L. T. 244.

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redemption subject to the prior alienations. In 1897 the Zamindar's younger son claiming that the estate was partible sold his share to a purchaser who transferred it to the 1st defendant, who claims to be entitled to a one-third share in addition to his rights as a representative of one of the original mortgagees. Both the lower Courts, however, have held that it was unnecessary to decide the question of impartibility in this suit. But the lower Courts gave the plaintiff a decree. Second appeals have been preferred by the 1st and 10th defendants and two questions have been argued before us.

In the first place, it is argued on the part of the 1st defendant that the plaintiff not being the owner of the whole of the equity of redemption and part of it having become vested in the 1st defendant himself who is also one of the mortgagees the plaintiff is not entitled to redeem such part. This contention is opposed to S. 60 of the Transfer of Property Act as well as to authority. S. 60 provides that " nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or *if there are more mortgagees than one, all such mortgagees* has or have acquired, in whole or in part, the share of a mortgagor." Here there are more motgagees than one, but only one of them has acquired in part the share of a mortgagor. It is therefore perfectly clear that the exception does not apply, that the plaintiff is bound to offer to redeem the whole mortgage. It seems equally clear that he is entitled to insist on doing so, (see S. 95 of the Transfer of Property Act) the general rule being as explained in *Huthasanam Nambudri* v. *Parameswarem Nambudri*[1] that a mortgage is one and indivisible, and the exception only arises when the mortgagee, or, if there are more mortgagees than one, all such mortgagees have acquired in whole or in part the share of a mortgagor. The rule is explained in Ghose on Mortgages 4th Edn. page 247. The appellant relied on *Kallan Khan* v. *Mardhan Khan*[2], but that was a case in which a single mortgagee had acquired a part of the mortgaged property, and was consequently within the exception. It was there held in cases coming within the exception the indivisible character of the mortgage was broken up and a mortgagor could not claim to redeem the shares of other co-mortgagors in which he was not interested, but the judgment expressly distinguishes that case from one in which " only one of several mortgagees had purchased a part of the mortgaged properties and the indivisible character of the mortgage had not been destroyed."

1. (1898) I. L. R. 22 M. 209.   2. (1905) I. L. R. 28 A. 155.

Mannu v. *Kuttu*[1], was a case in which a single mortgagee had purchased a portion of the mortgaged property and so came within the exception, and *Thillai Chetti* v. *Ramanatha Ayyan*,[2] was treated as coming within the same principle.

The next objection is that by a prior mortgage in 1863 the Zamindar mortgaged certain items included in the plaint mortgage together with other properties and that the 1st defendant having become solely entitled to such prior mortgage, the plaintiff is not entitled to redeem the plaint mortgage without redeeming that mortgage to the extent of the amount thereof, apportioned the items included in the plaint mortgage.

What the 1st defendant claims therefore is to consolidate the two mortgages, that is to say, to treat them as one and insist that one shall not be redeemed without the other. But even before the right to consolidate had been restricted by legislation, as by S. 61 of the Transfer of Property Act, it was always necessary that the two mortgages to be consolidated should have become united in title or come into the same hand, to use the language of *Lord Davey* in *Pledge* v. *White*,[3] and this cannot be said to be the case, whereas here the 1st defendant is only a part owner of the plaint mortgage. The point has been expressly decided in a later case *Riley* v. *Hall*.[4]

In the result the appeals fail and must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Basaweswara Swami ... ... *Appellant*.*

v.

The Bellary Municipal Council and the Secretary of State for India in Council. ... *Respondents*.

Municipality—Adverse possession against,—Essentials—Trust—Extra-commercium property—Acquisition by prescription—Injunction—Declaration Madras Municipal Act. S. 168.—Streets, rights of Municipality in.

Held Per *curiam*:—That in the case before their Lordships, the plaintiff who sued for a declaration of his right to a pial and for an injunction against the Local Municipality, had acquired under Act. XV. of 1877 by twelve years' adverse possession title to the site of the pial as against the Municipality ; and (2) that the Municipality had the right to remove the obstruction caused by the pial under S. 168 of the Municipal Act; (3) that the plaintiff was consequently not entitled to an injunction and (4) that the plaintiff was not entitled to a declaration when the substantial relief *i. e.* injunction was not garnted.

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*S. A: Nos. 1331 and of 1334 1910. 11th September 1912.

1. (1882) I. L. R. 6 M. 61.
2. (1896) I. L. R. 20 M. 295.
3. (1896) A. C. 187.
4. 79 L, T. 244.

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Per *Sundara Aiyar* J:—Although it is not open to the Municipality to give up the rights of the public or to affect the right of way possessed by the public by any act of their own, that would not for affect the capacity of a stranger to prescribe for title so as to affect the rights of the public.

The analogy of a trust and the prescription of title to trust properties which are in themselves *extra commercium* explained.

The question as to whether a possession is adverse or not does not depend on the needs or requirements of the owner, but on the character and occupation of the person in possession.

Though the soil is in one person another may be the owner of a building above the soil and the right to occupy a portion of space above the soil may be acquired by limitation.

Per *Sundara Aiyar* and *Sadasiva Aiyar* JJ. :—Rights of a Municiapality over land for purposes of laying out and preserving streets examined.

Second appeal from the decrees of the Court of the Subordinate Judge of Bellary in A.S. Nos. 2 and 18 of 2907 presented against the decrees of the Court of the District Munsif of Bellary in O. S. Nos. 185 and 175 of 1905 respectively.

J. C. Adam and *Suryanaraniah* for appellant.

L. A. Govindaraghava Aiyar, for the 1st respondent.

T. V. Seshagiri Aiyar, for the 2nd respondent.

The Court delivered the following.

Judgment:—*Sundara Aiyar* J.—This is a suit by the owner of a house in Bellary for a declaration of his right to a pial and for restraining the Municipal Council of the town from removing it. At the instance of the Municipal Council the Secretary of State for India in Council was made a party to the suit. The plaintiff's case was that the pial belonged to him and that the municipal council had therefore no right to remove it as it threatened to do. The Council denied the plaintiff's right to the site of the pial and the Government set up its ownership to the site. The issues framed in the suit raised the questions, how long the suit pial was in existence, whether the plaintiff acquired a prescriptive title to the site of the pial if he was not the original owner and whether the Municipality was entitled to demolish it.

Both courts have found that the street was dedicated to the public by the Government. The houses were built on sites originally belonging to Government which it gave to the people when they were compelled to remove from houses occupied by them within the fort of Bellary. The lower Courts also found that the land over which the pial stands was not part of the plaintiff's house. These findings are binding on us in second appeal. It has also been found by the

lower Courts that the pial was constructed about the year 1883 or 1884, that prior to its construction there were loose slabs of stone which were used for the purpose of vending various articles but that the Municipal servants used to remove these slabs when necessary for the purpose of repairing the drain.

It was argued before us that the plaintiff's possession must be taken to date from the time when the loose slabs were in existence; but having regard to the fact that the slabs used to be removed when the Municipality wished to do so, it is not possible to regard the plaintiff's possession as having been effective until the present pial was constructed in 1883. If the Municipality had the right to the space above the drain up to the portion occupied by the plaintiff, its right to possession was not disturbed, in an effective manner by the use of the loose slabs of stone. From 1883, however, the plaintiff must be taken to have obtained effective and exclusive possession of the pial.

The learned pleader for the Municipal Council argued that this possession was not adverse to the Municipality in as much as, for the purposes of its functions, it was not necessary for the Municipality to use the site of the pial. This contention I am entirely unable to accept.

According to the decision in *S. Sundara Iyer* v. *The Municipal Council of Madura and the Secretary of State for India in Council*,[1] the street, which on the findings must be taken to include the drain, was vested in the Municipality for the purposes of which the Council was constituted. Their right was not a mere right of easement, according to the view adopted by the learned Judges who decided that case, but was a special kind of property in the site previously unknown to the law but created by statute. This was also the view adopted by James L. J. in *Rolls* v. *Vestry of St. George the Martyr Southawak*,[2] See also the judgment of Lord *Morris* in *Municipal Council of Sydney* v. *Young*[3], *S. Sundara Iyer.* v. *The Municipal Council of Madura and the Secretary of State for India in Council*[1], regards a municipal council as having a right both to the surface of the street and to a portion of the soil beneath and the space above so far as would be necessary for the discharge of its functions as the authority bound to maintain, protect and repair the road. If then the Municipality was the owner of the site occupied by the pial in 1883 it must be taken to have been dispossessed by the plaintiff when he constructed the pial.

1. (1901) I. L. R. 25 M. 635. 2. (1880) 14 Ch. D. 795 and 796.
3. (1898) A. C. 457.

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Its right to possession would be extinguished when according to the Limitation Act in force a suit for possession instituted by it became barred. As the law stood before 1900 the time within which the Municipality could institute such a suit was twelve years. In 1895 or 1896, therefore, the Municipal Council's right to the site of the pial became extinguished; and the right of the public incidental to their right of way also became extinguished according to the view taken in *S. Sundara Iyer* v. *The Municipal Council of Madura and the Secretary of State for India in Council*[1]. Although it was not open to the Municipality to give up the rights of the public or to affect the right of way possessed by the public by any act of their own that would not affect the capacity of a person in hostile possession to acquire rights which would affect the public; see the judgment of Byrne J. in *Midland Railway* v. *Wright*[2].

A similar principle applies in other cases. Thus a trustee cannot alienate trust property except in certain circumstances, but a person can acquire a right by limitation to trust properties by adverse possession. Similarly the trustee's office itself is *extra commercium* but the right to it may be acquired by limitation. Mr. Govindaraghava Aiyar drew attention to an observation of *Benson* J. *S. Sundara Iyer* v. *The Municipal Council of Madura and the Secretary of State for India in Council*[1], in support of his argument that the possession of the plaintiff was not adverse to the Municipality so long as the Council did not require the site for the discharge of its functions. But the question whether possession was adverse or not does not depend on the needs or requirements of the owner, but on the character and occupation of the person in possession. It may no doubt be held that fugitive or unimportant acts of possession would not be sufficiently effective to make the possession adverse and that the license of the owner may be implied in such cases. But I cannot conceive what could be more effective occupation than building up the pial and occupying it exclusively. It must be taken to be now well established that although the soil may be in one person, another person may be the owner of a building above the soil, and that the right to occupy a portion of space above the soil may be acquired by limitation. See Lightwood's Time Limit on Actions, pages 17 and 18 and *Layburn* v. *Gridley*.[3] In *Midland Railway* v. *Wright*[2] it was held that the right to surface land over a tunnel could be acquired by prescription. In *Bevan* v. *London Portland Cement Company Ltd*,[4]

1. (1901) I. L. R. 25 M. 635.
2. (1901) I. Ch. 738.
3. (1892) 2 Chancery 53.
4. 67 L. T. 615.

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it was held that the right to a tunnel itself could be acquired by adverse possession. A similar view was held in *Mohan Lal Jechand* v. *Amratlal Bechar Das*,[1] by a Bench of which *West* J. was a member. It must therefore be held that as against the Municipal Council the plaintiff acquired a right to the pial by limitation on the expiration of 12 years from 1883 or 1884. I must observe that the view taken in *S. Sundara Iyer* v. *The Municipal Council of Madura and the Secretary of State for India in Council.*[2] that the right of a Municipal Council by virtue of streets vesting in it includes the right of possession was not questioned by any of the parties during the arguments. If the Municipal Council had no right to the possession of the space above the drain but only a right of user for the discharge of its functions with respect to the drain, the plaintiff's possession would even then not be worse, for as the person in possession of the pial he would have a right to it as against all but the true owner, namely Government in this case; and the Municipal Council would have no right to interefere with his possession or to demolish the pial. So far then, as the right of ownership is concerned, the plaintiff's right must be taken to be established as against the Municipality. As against Government, however, the plaintiff has not succeeded in establishing a title. The presumption of title arising from possession is of no use to the plaintiff in this case; because it has been found that the ownership of the site of the drain belonged to Government before the plaintiff took possession of the site of the pial. Until 1883 either the Government or the Municipality must be taken to have been in legal possession of the site; and the plaintiff has not been in possession for a period of 60 years so as to acquire a title by limitation as against Government.

The next question is whether the plaintiff is entitled to an injunction restraining the Municipal Council from removing the pial. That question depends on the construction of S. 168 of the District Municipalities Act. The right of the Municipal Council to the drain has not been affected by the acquisition of title to the pial by the plaintiff. According to S. 168 the Municipality is entitled to "cause any projection, encroachment or obstruction made against or in front of any land in any public street to be removed or altered as they think fit." Now the pial must be regarded as an obstruction made in land in the public street. As it appears that the pial is only 3 feet above the drain; it must be regarded as an obstruction of the drain in the street. The right of the Municipal Council to

1. (1878) I. L. R. 3 B. 174.

2. (1901) I. L. R. 25 M. 635.

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remove an obstruction does not depend on its title or right to the possession of it, as is clear from clause 3 of section 168, which entitles a person lawfully erecting an obstruction to reasonable compensation for the removal. The right to remove is given in the interests of the public to prevent obstruction on public roads and is not dependent on the Municipal Council's ownership. The injunction must therefore be refused. No claim was made in the plaint for compensation nor does it appear whether the pial itself had been removed at the date of the suit; it does not even appear whether it has been removed now. It was argued by Mr. Seshagiri Aiyar who appeared for Government that the Municipal council had received the sanction of Government for the removal of the pial and had therefore the right to remove it, but the Municipality did not set up the plea that its act was justified by the orders of Government. Nor does it appear, in what capacity, if at all, Government sanctioned the removal. I consider it somewhat extraordinary that after allowing the plaintiff to construct and occupy his pial for nearly a quarter of a century, the Municipality should claim to remove it without any compensation, and I take leave to doubt whether the Government would sympathize with and authorize such conduct on the part of the Council. As the prayer for a declaration of title was only incidental to the substantial relief asked for, namely injunction, no declaration can be granted in this suit as against the Municipality. The second appeal must, therefore, be dismissed with 2nd Respondent's costs.

Sadasiva Aiyar J :—The plaintiff is the appellant before us. The finding of the lower Court is that he has been in possession of the pial in front of his house for only 25 or 30 years before the suit. This pial is built so as to cover the Municipal drain and is 3 feet high from the road level, the drain being 1½ feet in width. The lower appellate Court found that the plaintiff has not acquired a prescriptive title to the land over which the pial in question projects either against the Bellary Municipal Council in whom the street and the drain site were vested or against the Government and hence dismissed plaintiff's suit which was brought for an injunction against the Bellary Municipal Council to restrain them from removing the pial as an encroachment on the drain and road.

I shall first shortly consider the question whether the drain and road over which the pial is built belong to the Municipal Council or the Secretary of State or both. In *The Municipal commissioner for the City of Madras* v *Sarangapani Mudaliar*[1] *Collins* C.J. and *Parker* J. state as follows:—"The English maxim once a highway,

1. (1895) I. L. R. 19 M. 154.

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always a highway is based on the theory that the property in a highway is in the owner of the soil, subject to an easement in favour of the public. In the case before us this legal fiction peculiar to English Law cannot arise; for there is no question of any easement whatever. *The street itself and the soil thereof is vested in the Municipality* in trust for the public. Both are united in the same person, that is, in the proprietor" and then they held that the defendant acquired a perfect title to a part of the road site which had been encroached upon by him *more than 12 years before the suit* brought by the Municipal Commissioners of the City of Madras to eject him from the encroached site. In that case the learned Judges further stated that "when the Crown has once ceded property to an individual or corporation, the grantee of the property stands in respect of the property granted in the same position as any other proprietor." *i.e.*, they clearly held that the Government lost all rights of proprietorship in the street *and the drain sites adjoining the sites after they had once vested it in the Municipality.* Next we come to the case in *S. Sundara Aiyar* v. *The Municipal Council of Madura and the Secretary of State for India in Council*[1] where *Bhashyam Iyengar* J. dissented from the above decision in *The Municipal Commissioners for the City of Madras* v. *Sarangapani Mudaliar*[2] and introduced all the fine distinctions known to English Law and held that the Municipal Council did not become by the vesting of the street and the drains in it the full owner of the site or soil over which the street exists, that it did not own the soil from the centre of the earth *usque ad caelum* and that it had only the right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as was necessary to enable it to adequately maintain the street as a street. With the greatest deference I might be permitted to express some regret that the complications known to English Law were thus introduced into this Presidency through the judgment of *Bhashyam Iyengar* J. The result has been as pointed out by that very learned Judge himself that there sprang up a sort of divided ownership between the Municipal Council and the Secretary of State, that there has been introduced different periods of limitation as against Municipal Council and as against the Secretary of State and that further "the curious result" of the new article 146A of the Limitation Act XI of 1900 would be that on the expiration of 30 years from the date of the dispossession of the Municipality the crown will have the land freed from the burden of the highway, both

1. (1901) I. L. R. 25 M. 635. 2. (1895) I. L. R. 19 M. 154.

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the Municipality and the man who had been in possession adversely to the Municipality losing all their rights. However it is probably now too late to go back on these distinctions which were based upon the view of the English and Scotch Law that the soil of public highway is presumed to be in the conterminous proprietors and that they merely allow the public to impose a servitude upon the highway, a view which need have no place in a country where porambokes, streets, streams, waters etc., almost invariably belong to Government till a private person is able to acquire a title by grant or prescription.

The plaintiff has acquired the right as against the Municipality in the present case to have the pial fixed over to the drain site by enjoyment for 12 years (which was the period for the perfection of title by prescription even against a Municipality before the Amending Act of 1900 was passed) for his adverse possession against the Municipality of this stratum of space at the height of 3 feet over the level of the drain began about 1880 and the 12 years' possession was completed in 1892; *Mohan Lal Jechand* v. *Amratlal Bechardas*[1] and *Rathinavelu Mudaliar* v. *Kolandavelu Pillai*[2]; but so far as the Government is concerned, he has not had possession for 60 years before the suit and hence his title against Government has not been perfected.

Now even in the case of the Municipality though plaintiff's title to the stratum of space at the three feet height above the drain covered by the pial has been acquired by prescription, the Municipality has under S. 168 of the District Municipalities Act 1884 (clause i) power to cause projections, encroachments or obstructions in any public street to be removed and the definition of "street" under section 3 clause (27) includes the drain space on either side of the street. There can be no doubt that though the Municipality may not have vested in it, the right to the space up to the sky over the drain and street, it must have had such a right at least up to height of about 12 feet over the level of the street in order that it might properly exercise its powers of repairing, widening and altering, cleaning and doing other duties in connection with the street and the drain. The pial is therefore clearly an encroachment, a projection and an obstruction in the street. They have the right accordingly to remove it and this suit for an injunction against their removal of such projection was rightly dismissed by the lower appellate Court. I would therefore confirm its decree though not on the grounds on which the lower Court based its decision. The appellant must pay the costs of the 2nd Respondent, the Secretary of State.

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1. (1878) I. L. R. 3 B. 174.
2. (1906) I. L. R. 29 M. 511.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Napier.

Mohideen Imbrahim ... . *Petitioner.* (Defendant.)*

v.

Mahomed Mura Levai through his agent Mahomed Mira Sahib } *Respondent.* (Plaintiff.)

Mohideen Imbrahim *v.* Mahomed Mura Levai.

Civil Procedure Code (XIV of 1882) S. 315—Right of suit for refund of price money by court sale purchaser—Limitation Act, Art. 120, 62, 97.

An auction purchaser had a substantive right of suit under the Code of 1882 for refund of the price money paid by him when it was found that the judgment-debtor had no saleable interest; and Art. 120 of the Limitation Act applied to such suits. A right for refund which arose under the old Code has not been taken away by the Code of 1908.

Per Napier J. (*Ayling* J *Dubitante*)—Under the Code of 1908 the auction purchaser has no substantive right entitling him to recover his money by suit, but only a right to get an order in execution proceedings for repayment and that too, only if he discovers the absence of title in the judgment-debtor before the confirmation of sale and not otherwise.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore in S. C. S. No. 156 of 1910.

K. Parthasarathi Aiyangar for petitioner.

G. S. Ramachandra Aiyar for respondent.

The facts of the case appear sufficiently from the judgment of Napier J.

The Court delivered the following.

Judgment:—*Ayling* J. The facts of the case are sufficiently set forth in the judgment of the Subordinate Judge: and his decision appears to me to be correct. Two points are argued on behalf of the petitioner, (1) that the present suit is not maintainable and (2) that it is barred by Art. 62 of Schedule I of the Limitation Act.

As regards the first point, the Court auction under which plaintiff (Respondent) purchased the property, the filing of O. S. No. 341 of 05 to declare the title of a third person other than the Judgment-debtor, and the final decision of that suit, all took place, while the old Civil Procedure Code (Act XIV of 1882) was in force. It has been repeatedly held that under S. 315 of that Act a suit by a Court auction purchaser to recover the sale price from the decree-holder would lie where it was found on a suit brought by a third party that the judgment-debtor has no title whatever to the property sold in Court

*C. R. P. No. 68 1911. 24th September 1912.

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auction (vide *Gurushidawa* v. *Gangaya*[1] following *Munnah Singh* v. *Gajadhar Singh*[2] *Pachappan* v. *Narayana*[3] and *Nilakanta* v. *Imam Sahib*.[4]) Plaintiff's right of suit accrued on 21st January 1907, when the decree in O. S. No. 341 of 05 was confirmed on appeal it does not appear that he ever obtained possession of the property purchased. Whether a similar right of suit exists under the present code is a point on which it is unnecessary to express an opinion, though I should be loth to hold that it did not. But I certainly do not find anything in the present code which would have the effect of taking away the right of suit which had accrued to the plaintiff before it came into force. I therefore hold the present suit to be maintainable.

As regards the question of limitation *Nilakanta* v. *Imam Sahib*[4] is authority for holding that article 120 applies to suits brought under S. 315 of the old Code. The petitioner relies on the cases reported in *Ram Kunwar Saha* v. *Ram Gour Saha*,[5] *Kovvuri Hasana Reddi* v. *Tallapragad Nayanna*.[6] The latter of these was a case of private sale, and though the Calcutta case was one of court sale the decision followed that in an earlier case of private sale, *Hanuman Kamat* v. *Hanuman Mandur*,[7] and the question of whether a suit under S. 315 should be distinguished was not considered. I hold that the suit is not time barred.

The petition must therefore be dismissed with costs.

Napier J.—This is a suit to recover from the defendant money paid on the purchase at a court auction in execution proceedings of certain property. The defendant was the decree-holder in S. C. 219 of 1894. In execution of his decree he brought certain lands to sale as belonging to his judgment-debtor and the plaintiff purchased them. Subsequently a third party brought a suit to establish his title to the land making the plaintiff and the defendant in this suit parties and his title was upheld. The plaintiff then applied in execution proceedings for refund of his money, but the court held that his remedy was by a suit. He accordingly instituted S. C. 156 of 1910 against the judgment-creditor and the Subordinate Judge gave him a decree.

It is contended in this court that no suit lies. It is admitted that under S. 315 of Civil Procedure Code of 1882 the purchaser would be entitled to receive back his purchase money; but it is argued

1. (1897) I. L. R. 22 B. 783.
2. (1883) I. L. R. 5. A. 577.
3. (1887) I. L. R. 11 M. 269.
4. (1892) I. L. R. 16 M. 361.
5. (1909) I. L. R. 37 C. 67.
6. (1911) I. L. R. 35 M. 39.
7. (1891) I. L. R. 19 C. 123.

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that under the present Code no such right exists and his rights are governed by the Code.

It is necessary to examine the history of this claim. It has been laid down by the Privy Council in *Dorat Ali Khan* v. *The executors Khajhee Moheeooddeen*,[1] that as in India moveable and immoveable property are alike capable of being seized and sold under the writ of *fieri facias* the responsibility of the sheriff in respect of sales here is governed by the law relating to chattels rather than by that relating to the sale of real property, It is clear that where the property seized was personal estate and it was sold by the sheriff no suit lay either against the sheriff or the judgment-creditor who had received the purchase money to recover it when the property had been recovered from the purchaser by a person claiming title the principle being that a sale by the sheriff was not a sale in market overt the purchaser acquiring thereby only what the judgment-creditor had a right to sell, namely, the precise interest and no more which the judgment-debtor possessed in the goods and that there was no warranty of title implied in a sale by the Sheriff (vide Halsbury's Laws of England Vol. XIV, paragraph 113). This is on the authority of *Chapman* v. *Speller*[2], which was a claim for money had and received by the purchaser at a sheriff's sale against the vendor of the goods. The court held that the true consideration was not the property sold but the assignment of the right of the judgment-debtor whatever it was, and that therefore there had not been a failure of consideration and accordingly the auction purchaser could not recover. It is clear from the decision of the Privy Council that that law applies in India apart from the statute. An attempt was made in *Soudamani Chowdranee* v. *Kishen Kishore Peddar*[3] to recover money paid in the like circumstances under the provisions of Regulation VII of 1825 but the Court negatived the right, and in so doing considered also the language of Act VIII of 1859 the first Civil Procedure Code. S. 249 of that Act provided that the proclamation should declare that the sale extended only to the right title and interest of the defendant in the property. Ss. 256 and 257 provided for circumstances under which sales might be set aside on the ground of material irregularity in the conduct of the sale. S. 258 provided that where the sale of immoveale property was set aside the purchaser should be entitled to receive back his purchase money and it was argued that this section applied where the property was recovered by a third party. The Full Bench negatived this view and held

1. (1878) I. L. R. 3 C. 806. 2. (1850) 14 Q. B. 621.
3. (1869) 12 W. R. F. B. Rulings p. 8.

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that it only applied where the sale of the immoveable property was set aside for irregularity under the previous sections. The Court laid down that a purchaser at a sale in auction knows that no one guarantees him that the judgment-debtor had a good title, that he purchased the property with his eyes wide open and regulates the price which he bids with reference to the risk. The law was materially altered by Act X of 1877, the provisions of which are re-produced in this respect in Act XIV of 1882. The proclamation under S. 287 of that Act did not state that all that was sold was the right, title and interest of the judgment-debtor. Further it purports to give a great deal of information about the property and especially requires to be stated the incumbrances to which the property is liable and every other thing which the Court considers material for the purchaser to know in order to Judge of the nature and value of the property. S. 311 corresponds with S. 256 of the Code of 1859 in allowing an application to the Court to set aside the sale on the ground of material irregularity. S. 312 corresponds with S. 257 and is the procedure section with reference to the above. Then comes an entirely new Section 313 entitling the purchaser to apply to the Court to set aside the sale on the ground that the person whose property purported to be sold had no saleable interest therein under S. 315 which embodies S. 258 of the Code of 1859 includes among the circumstances under which the purchaser was entitled to receive back his purchase money this new circumstance " when it is found that the judgment-debtor had no saleable interest in the property purported to be sold and the purchaser for that reason is deprived of it." It is to be noted that the procedure by which the money is to be recovered is not stated in this section and it has accordingly been held that these sections give a substantial right to recover money paid to a judgment-creditor which may be exercised either by suit or by petition in execution proceedings. This was expressly decided in *Pachayappan* v. *Narayanan*[1] where a suit to recover the money was held to be a proper procedure following *Nilakanta* v. *Imam Sahib*[2] and has been lately re-affirmed in *Ram Kumar Saha* v. *Ram Gour Shaha*[3] where the procedure was likewise by a suit.

We now come to the new Civil Procudure Code. Execution is dealt with in Part II of the Code Ss. 36 to 74 and in order XXI. The sections of the Code contain no provision dealing with this question. Order XXI R. 66 in like manner as S. 287 of the Code of 1882 does not contain the provision embodied in S. 249 of the the Code of 1859 that the proclamation should specifically state that only the

1. (1887) I. L. R. 11 M. 269. 2. (1882) I. L. R. 16 M. 361.
3. (1909) I. L. R. 37. C. 67.

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right, title and interest of the judgment-debtor shall be sold and is practically in the same terms as S. 287 of the Code of 1882. Order XXI, R. 90 embodies S. 311 of the old Code but gives the power to apply to the Court to set aside the sale on the ground of fraud in publishing and conducting it as well as on the ground of material irregularity. Rule 91 corresponds with S. 313 and empowers the purchaser to apply to the Court to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold and Rule 92 provides that where an application is made under Rule 91 and is allowed, the Court shall make an order setting aside the sale and unless such an application is made and allowed or an application to set aside on the ground of irregularity or fraud, the Court shall make an order confirming the sale and thereupon the sale shall become absolute. Then Rule 93 provides that where the sale is set aside for any of the above reasons the purchaser shall be entitled to an *order for re-payment* of his purchase money against any person to whom it has been paid. Now the language differs very considerably from S. 315 of the old Code. S. 315 provided that, where the sale was *set aside* under the corresponding sections, the purchaser should be "*entitled to receive back*" his purchase money and also "where it is found that the judgment-debtor had no saleable interest in the property." This last provision is entirely omitted in Or. XXI R 93 and the words "the purchaser shall be entitled to receive back his purchase money" are altered into the words "The purchaser shall be entitled to an order for repayment of his purchase money." The omitted words in S. 315 were the basis of the decisions in the cases above referred to, that a substantive right to receive back the purchase money was conferred upon the purchaser. This second substituted and limited right must be exercised before the sale is confirmed and when no such application is made the sale becomes absolute on the order of confirmation. It cannot of course be contended that these words can pass to an auction-purchaser property to which judgment-debtor had no title. It necessarily follows therefore that what is confirmed on the sale becoming absolute is only the right, title and interest of the judgment-debtor even though the notice to that effect is not inserted in the proclamation as it was under the Code of 1859. It is contended that this procedure works great hardship on an auction purchaser; for he may have no knowledge of the want of title in the judgment-debtor and may, therefore, not apply under Order XXI, R. 91 and that the real owner of the property may not bring his suit either for declaration or to recover possession until sometime after the confirmation of the sale in which circumstances the auction purchaser has no remedy. This is

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so; but the Legislature must be assumed to have had knowledge of the decisions that those words *created* a substantive right and of the results of the alteration made in the law. The right is no longer a substantive right entitling the auction purchaser to recover his money, but a right to get an order in execution proceedings for re-payment if he discovers the absence of interest before the confirmation of sale.

This being the law on the subject, it remains to ascertain the appellant's position. He purchased the property in August 1903; the suit by the stranger was brought in the same year, decreed on 13—3—06 and confirmed on appeal on 21—1—07. The Code of 1882 was in force then and accordingly there then accrued to the auction purchaser a right to recover the money by suit. By virtue of S. 6 of the General Clauses Act X of 1897 the repeal of the Code of 1882 by the New Code, Act V of of 1908 which came into force on the 1st of January 09 did not affect the right acquired under that enactment and it continued in him though his right to exercise it would in time become barred by limitation. He brought his suit to enforce this right in January 1910 and it is next contended that this suit is one for money had and received by the defendant for plaintiff's use, in which case limitation begins to run from the date when the money is received, *i. e.*, August 1905 under article 62 of both the old and the New Limitation Acts, and that therefore his suit is barred. Reliance is placed upon *Kovvuri Basiva Reddi* v. *Tallapragada Nagamma*[1] *Ramkumar Shaha* v. *Ram Gour Shaha*[2]. Apart from the cases there is one answer which must on principle be fatal to this contention which is this: that no article can apply which would make the right to sue liable to be barred before it has come into existence; and if this contention were correct, that could easily occur in a suit of this nature. The substantive right comes into existence under S. 315 when it is found that the judgment-debtor has no saleable interest. The true owner of the land might conceivably not bring his suit for ten years after the auction purchase and the cause of action would not arise till then. How could the suit on this cause of action have been barred seven years before it came into existence? A further answer is that this is not a suit at Common Law for money had and received to the plaintiff's use but a suit on a statutory right. In the case of a suit to recover purchase money paid for property bought at a private sale the case of *Hanuman Kamat* v. *Hanuman Mandur*[3] decided by the Privy Council is an authority for the proposition that Article 62 or Article 97 would apply according as whether the consideration failed originally or

1. (1911) I. L. R. 35 M. 39. 2. (1909) I. L. R. 37 C. 67.

3. (1891) I. L. R. 19 C. 123.

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subsequently, that is to say, the starting point is the time at which the cause of action occurred and this case has been followed in *Kovvuri Basiva Reddi* v. *Tallapragada Nagamma.*[1] As pointed out above, the cause of action in the present case did not arise when the money was actually paid as in the case of a sale by private contract when title is warranted, but on the date when it was found that the judgment-debtor had no saleable interest. This distinction has not been noted by the learned Judges who decided the case of *Ram Kumar Shaha* v. *Ram Gour Shaha*[2] and I am unable to agree with the view they took. There is a clear authority for the view that Article 62 does not apply in *Nilakanta* v. *Imam Sahib*[3] a case on all fours with this. The court held that Art. 120 was the appropriate article and undoubtedly the language is most apt with regard to the starting point "when the right to sue accrues." I agree with the view of the learned Judges in that case and it follows that this suit is in time and therefore the petition must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Guddati Reddi Obala ... ... *Plaintiff, (Appellant.)**

v.

Ganapati Kandanna. ... ... *Defendant. (Respondent,)*

Hindu Law—Adoption—Dancing girls of—Validity—Dancing girl who is?

Guddati Reddi Obala v. Ganapati Kandanna.

A family woman cannot be a dancing girl: and an adoption by a family Hindu woman of a girl is invalid.

Quære:—Whether an adoption by a dancing girl is invalid?

Per *Sadasiva Aiyar* J.:—An adoption of a minor girl by a prostitute belonging to a caste which ultimately follows prostitution as a profession is a criminal act under the Penal Code and is illegal. *Vengu* v. *Mahalinga*[4] dissented from. *Mathura Naicken* v. *Esu Naicken*[5] approved. Dictum in *Ghasti* v. *Umru Jan*[6] referred to.

Second appeal from the decree of the District Court of Kurnool in A. S. No. 60 of 08 presented against the decree of the Court of the District Munsif of Nandyal in O. S. No. 465 of 1906.

S. Swaminadhan for appellant.

V. C. Seshachariar for respondent.

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*S. A. No. 973 of 1911. 8th October 1912.

1. (1911) I. L. R. 35 M. 39.
2. (1909 I. L. R. 37 C. 67.
3. (1892) I. L. R. 16 M. 361.
4. (1888) I. L. R. 11 M. 393.
5. (1880) I. L. R. 4 B. 545.
6. (1893) I.L.R. 21 C. 149 at 159.

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Sundara Aiyar J.

The Court delivered the following.

Judgments :—*Sundara Aiyar* J :—The argument in second appeal is that the 2nd defendant was adopted by Chinna Rangamma and that the adoption is valid as one made by a dancing girl. But the finding is that Chinna Rangamma was a married woman. It is not explained how she can be treated as a dancing girl. It is stated that as she belonged to the Bogum caste she could adopt a girl, whether she was a married woman or not. But no such custom is found to be established by either of the two Courts. I dismiss the second appeal with costs. I am not to be understood as conceding that an adoption made by a woman of the prostitute class would be valid at all.

Sadasiva Aiyar J :—I should like to add that I dissent with the greatest respect from the case in *Vengu* v. *Mahalinga*[1]. I approve of the decision of the Bombay High Court in *Mathura Naiken* v. *Esu Naicken*[2]. I am also clearly of opinion that it is not only illegal to adopt girls by prostitutes but the illegality is, if possible very much enhanced by a woman of the prostitute class who has followed the practices of a moral family Hindu woman trying to follow the practices of a prostitute herself and adopt a girl for herself. The adoption in the case in *Vengu* v. *Mahalinga*[1] seems to have taken place before the Indian Penal Code was enacted in 1860. The validity of the adoption in that case might be therefore supported on that ground as it was sought to be so supported in *Kamalakshi* v. *Ramaswami Chetti*[3] ; but I wish to dissent from *Vengu* v. *Mahalinga*[1] on the broad ground that an adoption of a minor girl by a prostitute belonging to a caste which notoriously follows prostitution as a profession after the Penal Code came into force is a criminal act and is on that ground also clearly illegal. I am also clearly of opinion that the authority of *Vengu* v. *Mahalinga*[1] has been reduced to a minimum by the observations of the Privy Council in the case in *Ghasti* v. *Umrao Jan.*[4] Lord Hobhouse at p. 156 of the report clearly expresses his approval of the case of *Mathura Naiken* v. *Esu Naiken*[2] though of course it might be said that His Lordship does not express any definite opinion as it was unnecessary to do so for the purposes of that case which related to Mahomedan prostitutes. His Lordship says 'that whatever may be the case as regards Hindus, as regards Mahomedans, prostitution is not looked upon by their religion or their laws with any more favourable eye than by the Christian religion and laws. As a Hindu I wish to express respectfully but emphatically my opinion that prostitution is not looked on by the

1. (1888) I. L. R. 11 M. 393.
2. (1880) I. L. R. 4 B. 549.
3. (1895) I. L. R. 19 M. 127.
4. (1893) I. L. R 21 C. 149.

Guddati Reddi Obala v. Ganapati Kandanna.

Sadasiva Aiyar J.

Hindu religion or its laws with any more favourable eye than by the Christian or Mahomedan religion or the Christian or Mahomedan laws. When I was a Judicial officer in Madura I have had occasion to take evidence of old dancing girl witnesses in connection with dancing offices in temples and such witnesses have admitted that the so-called adopted girls are usually called 'Sirais' or captives and that many such girls of different castes were purchased by old dancing girls during the famine of 1876. Prostitutes are by the nature of their calling frequently sterile and it is the countenance given to adoption by the Courts which has been recruiting the ranks of the caste of prostitutes instead of letting the caste gradually die a natural death.

Even if a prostitute belonging to the so-called dancing girl caste be allowed to adopt a girl on the ground that the caste custom allows it even as against the Shastras it seems to me to go too far to allow plurality of adoptions as has been allowed by some decisions. Again, it is clear that in some castes such as a section of the Kaikkalar castes and in the Bogum caste, a girl can be married as a Hindu and lead a family life though born a prostitute. In the present case the 2nd defendant's foster-mother was so married and led a family life. The ordinary Hindu Law ought to be applied to such persons and not the law applying to the prostitutes. She and her husband were therefore clearly not legally entitled to adopt a girl and they ought to have adopted only a boy according to the ordinary Hindu Law. It is not alleged that 2nd defendant's foster-mother was a prostitute when she made the alleged adoption. Rather it is alleged that both she and her husband adopted the 2nd-defendant while they were leading a family life. Even if the foster-mother turned a prostitute(during her husband's life time or after his death) she could not be allowed to adopt a girl having once adopted the ordinary Hindu Law. In some case ingenious theories have been propounded that the adoption by a prostitute must be considered to have been intended for her own spiritual benefit and not to continue the line of the prostitute profession. Why Courts should have been astute to bolster up evil customs thus by fancying or presuming the existence of high spiritual motive have been somewhat of a surprise to me. As far as I know, no spiritual benefit can accrue to a prostitute mother by the spiritual ministrations of her prostitute adopted daughter and even adopted sons are very poor substitutes for legitimate sons according to Hindu Law. With these observations I agree in holding that this second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Payyam Vellathumkara Mathu Amma and others } *Appellant* (*Plaintiff*)*

v.

Payyam Vellathumkara Gopalan alias Ryru Nambiar and others } *Respondents* (*Defendants*)

Mathu Amma *v.* Gopalan

Malabar Law—Maintenance—Woman living away from tarwad house with her husband—No forfeiture—Waiver, what will amount to.

According to Marumakkattayam law a wife living in her husband's house is entitled to maintenance from her tarwad house.

Social customs may change without affecting the legal rights of parties.

It may be that on the facts of a particular case a waiver of the right to maintenance while a woman lives with her husband may be properly implied. If the husband is rich and able to provide properly for his wife and children and if no demand for maintenance is made on the tarwad for a long time, the court would be justified in inferring that there was no intention to make a demand on the tarwad for maintenance, but the question whether there was a waiver should be decided on the circumstances of each case.

Second appeal from the decree of the District Court of North Malabar in A. S. No. 173 of 1910 presented against the decree of the Court of the District Munsif of Coimbatore in O. S. No. 450 of 1910.

T. Richmond for appellant.

B. Sitarama Rao for *The Advocate-General* (*J. L. Rosario*) for respondents.

The Court delivered the following

Judgment:—The plaintiffs in the suit are a Nair lady and her children and the suit is for maintenance for a period of 27 months against their Karnavan and the other members of the tarwad. The plaintiffs are living with the husband of the 1st plaintiff who is also the father of the other plaintiffs. The defence is that as the plaintiffs are living away from the tarwad house, they are not entitled to maintenance. There is an allegation in the plaint that the 1st plaintiff's husband is not possessed of sufficient means to maintain her and her children in comfort. The written statement alleges that according to the practice in North Malabar a Nair lady is taken to her husband's house after the potamuri or marriage and that while she is living with her husband, she is not entitled to any maintenance from the tarwad. The District Munsif dismissed the suit on the ground that a member of a Marumakatayam tarwad is generally

* S. A. No. 1153 of 1911. 30th September 1912

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entitled to maintenance only while residing in the tarwad house, and that the decisions which have allowed separate maintenance to a member living away from the tarwad do not cover a case like the present one. He also refers to the case of *Parvathi* v. *Kamaran*[1], where it was held that a male member of a Marumakatayam tarwad is entitled to an allowance for his consort and children living with him, that is, in computing the amount to which he is entitled for his own maintenance the fact that he has to maintain a wife and children should be taken into account. The Munsif then refers to the fact that " the present day husband of a Marumakatayam female expects her to live with him and that it is even considered derogatory for the husband to have to visit his wife in her house." He continues:—"I do not deny that indications of such notions are apparent in the country, but side by side with such notions, it is to be hoped, is also growing up another notion that the husband is responsible for the bringing up of his wife and children. A husband who considers it derogatory to visit his wife in her house ought certainly to consider it disgraceful that his wife and children when living with him in his own house should be maintained at the cost of the wife's tarwad." The District Judge called for a finding on the question whether the plaintiffs were living with the 1st plaintiff's husband with the express consent of their Karnavan. The District Munsif submitted a finding stating that it was the practice for the members of the wife's tarwad to send her to her husband's in a formal manner. This necessarily indicates their consent. The Munsif observed that beyond this there was no other consent. The District Judge is apparently of opinion that this did not amount to express consent. We are unable to understand how persons who send their girls to her husband's house can be said not to consent in as express a manner as possible to her leaving them and living with her husband. The important question that arises for decision is whether according to the Marumakatayam law a wife living in her husband's house is entitled to maintenance from her tarwad. The Marumakatayam law of maintenance which is the same as the Aliyasanthanam Law prevailing in South Canara was reviewed at great length recently in a judgment to which one of us was a party *Marudevi* v. *Pamakka*[2] and the conclusion arrived at in that judgment was that a member of a tarwad who leaves the tarwad house for a justifiable or proper purpose would be entitled to enforce his or her right to share in the tarwad property by receiving maintenance out of it and that separate residence could not be a reason for refusing maintenance. The basis of the right to maintenance has been fully

1. I. L. R. 6 M. 341.
2. (1911) 22 M. L. J. 309.

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explained there. It is also indicated in that case that the desirability of living with one's husband is a good cause for a lady to live away from the tarwad house. It was argued then that custom was against it. The answer given was that the custom of all members of a tarwad living together is only a social custom.

Social customs may change without affecting the legal rights of parties. All members of a tarwad are entitled to the tarwad property and are entitled to the benefit of that property. The only way in which a junior member can receive benefit out of the tarwad property is by receiving maintenance. No decided case has been brought to our notice where it was held that a woman would not be quitting her tarwad house for a proper purpose when she does so in order to reside with her husband. As far as we are aware it is not considered improper; on the other hand, it is considered honorable that a wife should live with her husband if asked to do so. The members of the tarwad also consider it honorable both to themselves and to the lady who is asked by her husband to live with him that she should comply with his wishes. Perhaps, it should be added that an exception should be made in the case of some aristocratic families who consider their own social position so high that it would be derogatory to their ladies to quit their tarwad to live with their husbands, at any rate in a case where the husband is not of an equally high rank. The general rule, however, is as we have stated it. We cannot therefore regard that living with one's husband is a good ground for a woman governed by the Marumakathayam Law being compelled to forfeit her right to maintenance while she lives away from her tarwad house. There is no reason for supposing that the mere fact of her leaving her family homes to live with her husband must always be taken to amount to a waiver of her right to maintenance. Neither she nor her husband may be in a position to make such waiver. The District Munsif's observation that Nayars who consider it proper to take their wives to their own house should feel it disgraceful that their wife and children should be maintained at the cost of the wife's tarwad goes too far. There is no doubt that every honorable man would do his best to maintain his wife and children himself: but it is no disgrace if his means will not allow him to keep them in comfort. There is no reason why in such circumstances the wife and children should not enforce their legal right to get maintenance out of property belonging to themselves and other members of the tarwad. It may be that on the facts of a particular case a waiver of the right to maintenance while a woman lives with her husband may be properly implied. If the husband is rich and able

to provide properly for his wife and children and if no demand for maintenance is made on the tarwad for a long time the court would be justified in inferring that there was no intention to make a demand on the tarwad for maintenance; but the question whether there was a waiver should be decided on the circumstances of each case. In the present case, as already observed the plaintiffs state that the 1st plaintiff's husband had not sufficient means to provide adequately for her and her children. This allegation was not traversed by the Defendants. It appears to us that the District Munsif did not really try the suit though some documents were admitted in evidence. We must hold that he was wrong in dismissing the suit *in limine.* The plaintifts 2 to 4 are minor children of the 1st plaintiff and there can be no reasonable objection to their living with their mother and father. We decide that the plaintiffs are entitled to recover maintenance. We reverse the decrees of the courts below and remand the suit to the Court of first instance in order that the amount to which the plaintiffs are entitled to maintenance may be decided. Having regard to the fact that the law on the question has remained at any rate till recently, in a somewhat unsettled condition, both parties will bear their own costs up to date.

IN THE HIGH COURT OF JUDICATAURE AT MADRAS.

Present:—Mr. Justice Ayling, and Mr. Justice Napier.

T. Kamal Kutty, and others ... *Petitioners. (2nd party Nos. 2, 3, 4 and 6).

v.

Udayavarma Raja Valia Raja of Chirakkal ... *Respondent* (1st party).

Criminal Procedure Code (Act V of 1908), Ss. 145, 435, 439—Revision of proceedings under S. 145—Omission to record grounds—Irregularity in procedure.

No revision lies against an order passed under S. 145 of the Criminal Procedure Code, either under S. 439 or under S. 435. The essential requisities to give a Magistrate jurisdiction under S. 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning "land or water, or the boundaries thereof" in his jurisdiction. Once so satisfied his jurisdiction is complete and subsequent action must be considered in relation to procedure and not in relation to jurisdiction.

An omission to record grounds in the preliminary order is not a defect of jurisdiction.

The High Court does not usually interfere under S. 15 of the Charter Act as regards orders passed under S. 145 of the Criminal Procedure Code except in cases where the Magistrate had no jurisdiction to pass the order.

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*Cr.R.C. No. 44 of 1912 and Cr.R. No. 42 of 1912. 2nd October 1912.

Kamal Kutty v. Idayavarma Raja Valia Raja.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Joint Magistrate of Tellicherry in Miscellaneous Case No 30 of 1909.

This is a petition under S. 439 Cr. P. C. to revise an order made under S. 145 Cr. P. C.

T. V. Seshagiri Aiyar, Vakil for the petitioners.

E. R. Osborne, counsel, and *V. Ryru Nambiar*, vakil, for the respondent.

E. R. Osborne for respondent took a preliminary objection that no revision lay under Ss. 435 and 439 Cr. P. C. in such a matter and quoted *Hurbullabh Narain Singh* v. *Latchmeswar Prasad Singh*,[1] *Somayajipad* v. *Emperor*,[2] *Maninda Chandra Nandi* v. *Barada Kanta Choudry*,[3] *Maharaja Tewari* v. *Harcharan Roy*.[4]

T. V. Seshagiri Aiyar for petitioner. A revision lies under S. 439 though not under S. 435 Cr. P. C. The latter section does not control the former which is wide enough to include petitions by parties etc., which will be included in the words ' or otherwise comes to its notice' to be found in S. 439. Corresponding Sections in the previous Cr. P. Code referred to. He also referred to *Nobin Kristo Mukerjee* v. *Russik Lall Saha*[5] for the meaning of the word 'otherwise.' He referred to *Ananda Chandra Battacharjee* v. *Carr Stephen*[6] *Martin* v. *Emperor*[7] *Bihari Lal* v. *Emperor*[8] to show that the Legislature never intended to restrict the powers of the High Court : see also *In re Pandurang Govind*,[9] *Reid* v. *Richardson*,[10] *Agra Bank* v. *Lakshman*,[11] *Queen Empress* v. *Lakshmidas*.[12] On questions of jurisdiction revision lies *Mahadev Kunwar* v. *Beasu*,[13] *Mohesh Sircar* v. *Narayan Bagh*[14], *Queen-Empress* v. *Pratap Chander Ghose*,[15] *Baskari* v. *Bashakari*,[16] *Nityananda Roy* v. *Paresh Nath*.[17] Failure to comply with the requirements of a section deprives a court of its jurisdiction. *Nussurwanji* v. *Mir Minundin*[18] *Queen Empress* v. *Govind Chander Das*[19] *Danput Singh* v. *Chatiaput Singh*,[20] *Sabid*

1. (1898) I. L. R. 26 C. 188, 192.
2. (1909) I. L. R. 33 M. 52.
3. (1902) 30 C. 112, 117, 118.
4. (1903) I. L. R. 26 A. 144.
5. (1884) I. L. R. 10 C. 268.
6. (1891) I. L. R. 19 C. 127.
7. (1904) A. W. N. 234.
8. (1907) A. W. N. 49.
9. (1900) I. L. R. 24 B. 527.
10. (1887) I. L. R 14. C. 361.
11. (1894) I. L. R. 18 M. 41.
12. (1889) I. L. R. 14 B. 165.
13. (1903) I. L. R. 25 A. 537.
14. (1900) I. L. R. 27 C. 981.
15. (1898) I. L. R. 25 C. 852.
16. (1908) I. L. R. 31 M. 318.
17. (1905) I. L. R. 32 C. 771.
18. (1855) 6 M. I. A. 134
19. (1893) I. L. R. 20 C. 520.
20. (1893) I. L. R. 20 C. 513.

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Mandul v. *Lakshmi.*[1] As to whether the order is merely irreuglar or void: see *Subramania Aiyar* v. *King Emperor*,[2]—see also *Syed Mahomed Ghouse* v. *Syed Kadir Badsha Sahib*[3]. *In re Chinnappa Udayan*[4] *Posuka Kulla Chikka Hina*,[5] *Bihari Lal* v. *Emperor.*[6]

E. R. Osborne for respondent. Ss. 435 and 439 must be read together. S. 435 is the main section which deals with the question how and in what cases the revisional powers of the High Court can be invoked. S. 439 simply deals with what the High Court can do in revision. He referred to the previous history of the section to support this view—'otherwise' is only *ejusdem generis*. The legislature never intended to enlarge the powers of the High Court as they existed in the prior acts. He referred to the following cases to show when there is a want of jurisdiction and when High Court has interfered. *Somayajipad* v. *Emperor*[7]. *Harbullabh Narayan Singh* v. *Lutchmeswar*[8], *Jagamohun Pal* v. *Ramkumar Gop*,[9] *Lokanath Shah Chowdry* v. *Nedu Biswas*,[10] *Maharaj Tewari* v. *Harcharan Rai*,[11] *Linghe Singh* v. *Ram Pratap*,[12] *In re Pandurang Govind*,[13] *In re Pandurang Govind*,[14] *In re Vasudeo Apaji*,[15] *Kosh* v. *Nazir Mahomed*,[16] *Sukh Lal* v. *Tara Chand*,[17] *Anesh Mullah* v. *Ejahareddi Mulla*,[18] *Tarapada Biswas* v. *Nural Hug.*[19] If the report, of the Police officer is before the magistrate he has jurisdiction and nothing occurring later can deprive him of it.

T. V. Seshagiri Aiyar replied. S. 439 recites the inherent powers of the High Court just like S. 151 C. P. C. and S. 25 of the Small Cause Courts Act. If the High Court can call for records it can also deal with the case. I rely also on *Anesh Mullah* v. *Ejahareddi Mulla.*[18] There is no police report on the record. That is sufficient to show that the magistrate has no jurisdiction. *Tarapada Biswas* v. *Nural Hug.*[19]

The Court made the following.

ORDER:—This is a petition put in under section 439 of the Criminal Procedure Code asking for revision of an order of the

1. (1902) 7. C. W. N. 599, 601.
2. (1902) I. L. R. 25 M. 6. 96 (P.C.)
3. (1905) 16 M. L. J. 148.
4. (1907) I. L. R. 30 M. 548.
5. (1907) 17 M. L. J. 449.
6. (1905) 2. A. L. J. 272,
7. (1909) I. L. R. 33 M. 52.
8. (1898) I. L. R. 26 C. 188.
9. (1901) I. L. R. 28 C. 416, 418.
10. (1902) I. L. R. 29 C. 383.
11. (1903) I. L. R. 26 A. 144.
12. (1908) I. L. R. 31 A. 150.
13. (1900) I. L. R. 24 B. 527.
14. (1900) I. L. R, 25 B. 179, 186.
15. (1902) 4. Bom. L. R. 582.
16. (1905) I. L. R. 33 C. 352 (F.B.)
17. (1905) I. L. R. 33 C. 68.
18. (1901) I. L. R. 28 C. 446, 449.
19. (1905) I. L. R. 32 C. 1093.

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Joint magistrate of Tellicherry in Miscellaneous Case No. 30 of 1909 on the 16th October 1911 passed under section 145 of the Criminal Procedure Code. The preliminary objection is taken that the Court in the exercise of its revisional powers under the Code cannot deal with orders made under that section and reliance is placed on section 435, clause 3, which provides that proceedings under Chapter XII are not proceedings within the meaning of that section. It is contended however on behalf of the petitioners that the Court can exercise its powers under section 439 without calling in aid section 435. The point has been argued at great length and most ably by Mr. Seshagiri Aiyar. He relies on the words "which otherwise comes to its knowledge" in section 439, clause (1), and contends that that phrase has reference to action taken by the High Court on petition in contradistinction to action taken when the record has been called for "*by itself*" in the earlier words of the section which, he contends, is limited to action by the High Court *suo motu*. He further relies on similar words in section 438 which, he argues, entitle a Sessions Judge or District Magistrate likewise to examine records of proceedings of inferior Magisterial Officers otherwise than by calling for the records under section 435. He admits that the result of this interpretation of the sections would be that the Sessions Judge or District Magistrate cannot call for and examine and report for the orders of the High Court the records of proceedings of inferior Criminal Courts under section 144, chapter XII and section 176, but that they can under some power referred to as "otherwise," but the authority for which does not appear, get the record without calling for it and report the case for the orders of the High Court under section 438. That is to say, that the ordinary channel by which proceedings under these sections and all other judgments and orders, are examined by the Sessions Judge and the District Magistrate and reported for orders, is blocked up by the Legislature with respect to these proceedings, but that those officers can still exercise the power of reporting if the record comes before them in some other manner not explained. Now this could hardly have been the intention of the legislature. The recognized procedure by which those Courts exercise revisional jurisdiction over the proceedings of inferior Courts is by calling for the records under section 435. The legislature has taken away that jurisdiction, persumably intending that these proceedings which are all of a special nature should not be interfered with either by the High Court or the Sessions Judge or the District Magistrate. These proceedings are none of them criminal or punitive. Sections 143, 144 and 145 are prohibitive in the interest of the public peace and public good. Section 176 is a special section empowering a Magistrate to hold

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an investigation where any person dies when in the custody of the police. We have no doubt that the legislature intended to leave action under these sections where cause is shown to the unfettered discretion of the local Magistracy; and we cannot from the use of this word "otherwise" in section 438 infer a power in the Sessions Judge and the District Magistrate to interfere with such orders when they are expressly forbidden by section 435 to call for the records. In our opinion the words in section 439 " the record of which has been called for by itself are not limited to cases where High Court acts *suo motu*. It must be borne in mind that although when the earlier Criminal Procedure Codes were passed the legislature had chiefly in view the exercise of revisional powers by the High Court and those superior officers on inspection of the calendars, it recognized as early as 1872 that parties could invoke these powers by petition. But in any case whether the High Court or these officers act of their own initiative or on petition, they must call for the records and in fact the petition invariably asks them to do so in so many words. The reason why the limiting powers are found only in section 435 will be found on an examination of the history of this legislation.

Act X of 1872 is the first code after the establishment of the High Court. ChapterXXII is headed "Superintendence and Revision' and begins with section 292 which empowers the High Court to issue general rules for the keeping of books etc., by all criminal courts and for the preparation and transmission of any calendars or statements to be prepared and submitted by such courts. Section 293 provides that all Subordinate Courts shall send to the High Court such periodical statements or calendars of trials held by such courts as the High Court prescribes exhibiting the offences charged, the offences of which the accused are convicted and the sentences or orders passed upon them. Section 294 proceeds to lay down that the High Court may call for and examine the record of any case tried by any Subordinate Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order and the regularity of the proceedings of such court and section 295 gives the same power to the court of Session or the Magistrate of the District with regard to the sentences, orders and proceedings of Subordinate Courts. These four sections obviously set out the machinery for revision. The High Court has to make rules for the transmission of the calendars by all courts. All Subordinate Courts are then required to send certain calendars such as the High Court prescribes, direct to the High Court; and if on the examination of a calendar the High Court thinks that there may be something illegal or improper about the order, the next process is to call for and examine

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the record of such case. The language used in each succeeding section adopts the language of the prior section and it is obvious that these sections contain the machinery. Then comes section 297 which is practically identical with the present section 439 and this lays down what the High Court can do after examination of the record. It follows therfore that the words "called for by itself" in section 297 have reference to the whole of the powers of revision given by that chapter to the High Court. The last clause of section 297 makes it clear that the High Court can hear any person either personally or by agent in the exercise of its powers of revision which sufficiently indicates that the legislature contemplated that these powers would be exercised on petition. It will thus be seen that the method by which the records came to the High Court was in one set of sections, namely, 294, 295 and 296 and the power of the High Court to deal with the record was in another section 297, just as now sections 435 and 438 provide the machinery and section 439 gives the power to dispose of the record.

Act X of 1882 the next Code was practically the same as the present code and continued this method of treatment and in this Code sections 143, 144 and 176 were excluded from the revisional powers. The only alteration made by the present Code is that orders under section 145 are added to those excluded. It seems clear therefore that the language in section 439 " the record of which has been called for by itself " is not used in contradistinction to " which otherwise comes to its knowledge " but as contrasted with " which has been reported for orders " and that it has reference to the recognized channels by which the High Court becomes seized of the case, that is to say, either by calling for the record itself or by having the case reported to it under section 438 by a Sessions Judge or District Magistrate who has himself called for the records under section 435 ; and whether it has called for the record itself or is dealing with it where the record has been called for by a Sessions Judge or District Magistrate and reported to it, in either case the Court is acting both of its own motion and on petition. There is therefore no room for the reading of those words " otherwise comes to its knowledge " as having reference to petition. It cannot be suggested that without those words or the word " otherwise" in section 437 the High Court, a Sessions Judge or a District Magistrate could not act on petition. When once this is clearly understood the difficulty raised by the omission of the Legislature to insert the words " section 439 " in the exception clause disappears. Section 435 is the initial power whether exercised by the High Court or the Sessions Judge or the District Magistrate, and whether of their own motion or on petition. When

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the Legislature took away this power, it cut off the jurisdiction of the High Court at its fountain-head. The machinery by which the High Court became seized of the case under the Criminal Procedure Code being gone, it was unnecessary to forbid the exercise of powers which depended on such seizin. This view of the meaning of the sections has been uniformly adopted by all the High Courts. It is the recognized practice of this Court never to interfere with the excepted proceedings under its revisional powers but only under the charter. *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh*[1] *Jagomahun Pal* v. *Ram Kumar Gope*[2] *Lokenath Shah Chowdhry* v. *Nedu Biswas*[3] and *Kosh Mahomed Sirkar* v. *Nazir Mahomed*[4] all clearly establish the view of that Court that this jurisdiction of the High Court to revise under the Criminal Procedure Code is gone. *Maharaj Tewari* v. *Harcharan Rai*[5] and *Jhingai Singh* v. *Ram Partap*,[6] show that the Allahabad High Court takes the same view. And *In re Pandurang Govind*[7] *In re Pandurang Govind*[8] lay down the same principle. On the above reasoning and uniform authority of all the High Courts we hold that a petition does not lie under section 439 to revise these proceedings.

It is next argued by Mr. Seshagiri Aiyar that these words "otherwise comes to its knowledge" might have reference to the power of the High Court under the Charter in the exercise of its superintendence and that the High Court can call for records under those powers and then proceed to exercise the powers under section 439. The answer to this is that the High Court in its exercise of its powers under the Charter has never purported to deal with cases except where there has been an improper exercise of jurisdiction. Further it would be an extraordinary reading of the Criminal Procedure Code to suggest that it clothed the High Court in the exercise of its powers under the charter with the whole of the powers that it can exercise on appeal, while at the same time it provided a special machinery apart from the Charter by which the High Court could exercise those powers.

It has never yet been suggested that the Criminal Procedure Code intended to set up two different procedures in revision; one, the ordinary procedure under Sections 435, 438 and 439 and another, by the Charter Act and section 439. Whatever these words in Section 439 and the word "otherwise" in Section 438 have reference to, it must be some power which the Legislature assumed to exist in the

1. (1898) I. L. R. 26 C. 188.
2. (1901) I. L. R. 28 C. 416
3. (1902) I. L. R. 29 C. 382.
4. (1905) I. L. R. 33 C. 352.
5. (1903) I. L. R. 26 A. 144.
6. (1908) I. L. R. 31 A. 150.
7. (1899) I. L. R. 24 B. 527.
8. (1900) I. L. R. 25 B. 179.

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High Court, the Sessions Judge and the District Magistrate under the Criminal Procedure Code. This has been expressly decided with reference to the words in Section 438 in *Nobin Kristo Mukerji* v. *Russick Lall Laha*,[1] where the Court used the following language at page 272. "We think that these words 'or otherwise' being words of general import following the particular words 'under Section 435' must be construed according to the usual rule and that they mean not 'in any other way whatsoever" but "in any other way provided by the Code" and the Court declined to accept the contention that they gave the District Magistrate a power quite independent of the power conferred upon him in cases in which he has proceeded under Section 435. We entirely concur with this view. That these words "or otherwise" in section 438 of the Criminal Procedure Code cannot of course have reference to any power outside the Criminal Procedure Code, is clear from the fact that the Code created the Judicial officers whose powers are dealt with therein and that their powers must necessarily be found within the four corners of the Code. That being so, there is no reason why a wider meaning should be given to the words "or otherwise comes to its knowledge" in section 439 and reference ought to be made to the Charter to explain their meaning. If the words in section 438 are limited to powers to be found in the Code, as they must be, the words in section 439 should be similarly limited. They are not words which confer a power. They are words which save any power that exists and it is not unusual for statutes to contain saving general words of this nature.

The practical importance of the question we have just considered lies in this. If the order is open to revision under section 439 Criminal Procedure Code, the petitioners may ask us to go into the record of the case, at any rate, to the extent of considering whether there is evidence to support the Magistrate's conclusion, or whether any grave irregularity in procedure has been committed, and, to bear such facts in mind in deciding as to whether to interfere or not. Of course the power of interference in revision is discretionary: but under section 439 the advisability of interference would be determined on the same considerations as in an ordinary criminal case.

Under section 15 of the Charter Act, on the other hand, it has never been customary to interfere—certainly in cases of this class—except where it can be said that the Magistrate's order was passed without jurisdiction. This is most clearly laid down by a bench of

1. (1883) I. L. R. 10 C. 268.

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this Court in *Bhaskari Kasavarayudu* v. *Bhaskaram Chalapatirayudu*[1] where their Lordships say "The Magistrate had jurisdiction to act under section 145 Criminal Procedure Code and *this Court has no jurisdiction to interfere.*"

Our attention has been drawn to a single case in which interference has been exercised on other grounds—*Reid* v. *Richardson*.[2] In that case no doubt the High Court found that the Magistrate had jurisdiction, but nevertheless went into the merits of the case, decided that an order under section 146 Criminal Procedure Code was the proper order to be passed, and not that passed by the Magistrate under section 145, and disposed of the case accordingly. In so doing they placed it on record that they were departing from the usual course and justified the departure on the unusual circumstances of the case. We cannot attach much importance to an isolated instance of this kind in the face of the otherwise uniform practice to the contrary; and we may say at once that we can discern no exceptional circumstances in the case before us which would justify departure from the usual course. In a later case of the same Court *Hurbullubh Narain Singh*, v. *Luchmeswar Prosad Singh*,[3] the view taken was that "although powers as a Court of Revision under the Code (Criminal Procedure Code) cannot be exercised, still, if an order challenged be without jurisdiction, that is to say, if it be outside those sections, the mere fact of the order purporting to be so passed would not bring it within those sections so as to debar the exercise of powers under section 15 of the Charter Act to set it aside as null and void and without jurisdiction." Precisely the same view is taken in *Mahadeo Kunwar* v. *Bisu*[4] and in *In re Pandurang Govind.*[5]

We, therefore propose in dealing with the present case to confine ourselves to considering whether the order of the Magistrate which we are asked to revise was passed without jurisdiction. The only ground on which the jurisdiction of the Magistrate in the present case is attacked is his failure to record in the preliminary order passed by him under the first clause of section 145 Criminal Procedure Code the grounds on which he was satisfied that a dispute existed likely to cause a breach of the peace. The order itself runs as follows: "Whereas on information received from the Tahsildar of Chirakkal, and the Inspector of Police, Cannanore Division, I am satisfied that there is a dispute likely to cause a breach of the peace concerning the possession of * * * *". Section

1. (1908) I. L. R. 31 M. 318.
2. (1887) I. L. R. 14 C. 361.
3. (1898) I. L. R. 26 C. 188 at 193.
4. (1903) I. L. R. 25 A. 537.
5. (1889) I. L. R. 24 B. 527.

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145 requires that the preliminary order shall be in writing and shall state the grounds of the Magistrate being so satisfied. We do not think this requirement has been complied with in the present case. The contention of the learned vakil for the petitioners is that failure to do so goes to the jurisdiction of the Magistrate and renders all subsequent proceedings null and void and without jurisdiction. His chief reliance is on the principle laid down in a Privy Council Case reported in *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan Wallud Meer Sudroodeen Khan Bahadoor.*[1] This ruling cannot in our opinion be extended to the case before us. The judgment delivered so long ago as 1855 deals with the effect of the failure to specify in a deed of submission to arbitration the time within which the award was to be given. Bombay Regulation VII of 1827, section 3, requires that this should be specified in the deed of submission, and the Privy Council held that the omission constituted a fatal objection to the validity of the award given thereunder. They stated that "Where jurisdiction was given to a Court by an Act of Parliament or by a Regulation in India and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise" in applying these observations the important words are "Where such jurisdiction is only given on certain specified terms" that means where jurisdiction is "founded" on compliance with certain preliminary conditions. The regulation under consideration in that case ousts under certain specified conditions the jurisdiction of the ordinary tribunals constituted by law and gives jurisdiction to a private tribunal constituted *ad hoc* and having no existence apart from the particular purpose for which it was constituted. Their lordships held that these specified conditions must be rigidly and exactly fulfilled. In the present case the section gives to ordinary tribunals in the shape of certain classes of Magistrates the power to do certain things and we are clearly of opinion that the principles laid down in the above ruling have no application to the case before us. If the jurisdiction of a Magistrate to take action under the Criminal Procedure Code is destroyed by failure to comply with any provision of the Code as to his preliminary procedure, then it would have to be held, for example, that failure to sign the complainant's statement on oath as required by Section 200 Criminal Procedure Code rendered any subsequent trial and conviction null and void and without jurisdiction. It may be suggested that such an irregularity would be covered by Section

1. (1855) 6 M. I. A. 134.

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537 Criminal Procedure Code. But that section might with equal propriety be invoked to cover the omission with which we are concerned.

We need do no more than refer to *Subramania Aiyar* v. *King Emperor*[1] which has been cited on behalf of the Petitioners. That ruling simply deals with the effect of disobedience to an express provision of law as to the mode of trial and in no way touches on the effect of an error of procedure antecedent to the trial or the jurisdiction of the Court. Indeed it shows that the case in Moore's Indian Appeals cannot be read as contended for by Mr. Seshagiri Aiyar, for, if it should be so read then the Privy Council in this later case would have held that the whole trial was without jurisdiction owing to the illegality of the charge which is at the inception of the trial.

The applicability of both these rulings to a case like the present has been carefully considered by two learned Judges of the Calcutta High Court (*Rampini* and *Mookerjee* JJ.) in their order of reference in the case of *Kosh Mahomed Sirkar* v. *Nazir Mahomed*[2] and they have arrived at the same conclusions as ourselves.

The exact effect of an omission to set forth in a preliminary order under section 145 the grounds of the Magistrate's opinion has been considered in several cases both in this and other High Courts, the conclusions arrived at being by no means uniform. In this Court we have on the one side the ruling of *Munro* and *Sankaran Nair* JJ. in *Posuka Kulla* v. *Chikka Hiria*[3] and on the other side the ruling of Subramania Aiyar J. in *Sayid Mahomed Ghouse Sahib* v. *Sayid Khadir Badshah Sahib*[4] and *In the matter of Chinnappudayan*[5] and of *Wallis* J. in *Posuka Kulla* v. *Chikka Hiria*[3] which was the subject of a Letters Patent Appeal in the case first quoted. Opinions might therefore appear to be equally divided: but a consideration of the judgments in the above cases tends in our opinion strongly against petitioner's contention. *Subramania Aiyar* J. was undoubtedly of opinion that the failure to record reasons in the preliminary order did not affect the jurisdiction of the Magistrate. *Wallis* J. was of the same opinion. He does not discuss the question but adopts the reasoning of the referring Bench in *Kosh Mahomed Sirkar* v. *Nazir Mahomed*[2] already referred to. *Munro* and *Sankaran Nair* JJ. do not give reasons for differing from his view, beyond distinguishing the Calcutta case on the ground that in that order a

1. (1902) I. L R. 25 M. 61
2. (1905) I. L. R. 33 C. 352.
3. (1907) 17 M. L. J. 449.
4. (1906) 16 M. L. J. 148.
5. (1907) I. L. R. 30 M. 548.

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police report was mentioned as the basis of the order. If this be a valid ground of distinction we may point out that in the order in the present case the Magistrate sets forth that he is satisfied "on information received from the Tahsildar of Chirakkal and the Inspector of Police, Cannanore Division." It is therefore by no means clear (to put it on the lowest ground) that the Bench would have held that the Magistrate's jurisdiction was defective in the present case.

But apart from this, we may point out with great respect for the learned Judges composing the Bench that they do not appear to have considered the very weighty reasoning of *Rampini* and *Mookerjee* JJ. in support of their views on their second point of reference. It is this reasoning which appears to have been relied on by *Wallis* J. and in this reasoning we also concur. It appears to us to be so conclusive that we cannot usefully add anything to it.

It may, of course, be argued that the views of the referring Bench on this point have not been specifically endorsed by the Full Bench which confined itself to answering the 1st question propounded. But, as we already stated, the arguments of the Bench are, to our mind, convincing even without other authority. The Full Bench has most certainly suggested no dissent therefrom; and we may add that having answered the 1st question in the negative holding that the initial order was not substantially defective, they could not possibly have come to any other conclusion than one, that the omission to record grounds in the preliminary order did not affect the jurisdiction of the Magistrate.

This is the view which commends itself to us, although we are glad to fortify ourselves by the weighty authority and careful reasoning which we have quoted. The full Bench of the Calcutta High Court having stated the law of that Court in *Kosh Mahomed Sircar* v. *Nazir Mahomed*[1] it is not necessary to discuss the earlier Calcutta rulings relied on by the learned vakil for petitioners. (*Mohesh Sircar* v. *Narain Bagh*,[2] *Nittyanand Roy* v. *Paresh Nath Sen*[3]). The essential requisite to give a Magistrate jurisdiction under section 145 Criminal Procedure Code is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. For the above reasons, we decline to interfere with the Magistrate's order and dismiss the petition.

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1. (1905) I. L. R. 33 C. 352. 2. (1900) I. L. R. 27 C. 981.
3. (1905) I. L. R. 32 C. 771.

It is none the less the duty of all Magistrates to comply strictly and fully with these and all other provisions of the Code and of District Magistrates where necessary to draw the attention of Subordinate Magistrates to this point.

Kamal Kutty v. Udayavarma Raja Valia Raja.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present;—Sir Ralph S. Benson, Officiating Chief Justice and Mr. Justice Sankaran Nair.

The Madras and Southern Mahratta Railway Co., Ltd., Madras ... ... *Appellant.** (*1st Defendant.*)

v.

Bhimappa and another ... ... *Respondents.* (*Plaintiffs.*)

Limitation Act Art. 30.—Suit against a carrier for compensation for loss of goods—Onus of proof of time—Notice of claim to Traffic manager—Compliance with Rules of company—Estoppel.

The burden of proving in a suit governed by Art. 30 of the Limitation Act the time when the goods entrusted to a Railway Company were lost, is on the company.

Notice of the claim for compensation to the Traffic manager is good notice.

The modes of service prescribed by the Railways Act are not exhaustive. *Periannan Chetty* v. *South Indian Railway Co.*,[1] followed.

If a mode of service is prescribed by the Rules of a Railway Company and the rule is complied with, it is not open to the company to plead that the compliance with the rules is insufficient in law.

Madras and Southern Mahratta Railway Co., Ltd. v. Bhimappa.

Appeal from the decree of the City Civil Court at Madras in O. S. No. 148 of 09.

D. Chamier instructed by *David and Brightwell* for appellants.

K. Narain Rau and *K. Balakrishna Rau* for respondents.

The Court delivered the following.

Judgment:—We agree with the Judge that the plaintiffs' claim is not barred by limitation. The burden of proving when the goods were lost is on the Railway Company and they have not proved when they were lost. There is nothing in the evidence to show that they were lost more than one year before the institution of the suit. Art. 30 of the Limitation Act does not therefore bar the suit nor is the suit barred by Art. 31. No time has been fixed for

*C. C. A. No. 22 of 1910. 30th September 1912.

1. (1898) I. L. R. 22 M. 157.

Madras and Southern Mahratta Railway Co., Ltd. *v.* Bhimappa.

the delivery of the goods and the correspondence between the parties shows that the matter was being inquired into and the suit was brought within one year from the date of refusal to deliver. We are unable to say that the plaintiffs delayed more than one year from the expiry of a reasonable time within which in the circumstances of the case the goods should have been delivered.

The next question is whether the notice of the plaintiffs' claim for compensation was given within the period of six months allowed by the Railways Act. It is conceded that notice of such claim was given to the Traffic Manager. But it is contended that such notice is insufficient and that notice should have been given to the Agent or at any rate the notice was though given only to the Traffic Manager should have reached the Agent within six months of the delivery of the goods to the Railway Company. We have held that the modes of service prescribed by the Railways Act are not exhaustive and we see no reason to differ from that judgment. *Periannan Chetti* v. *South Indian Railway Co.*[1] In the case before us, a rule has been made by the Company that all applications for loss should be made to the nearest Station Master and Traffic Manager, Dharwar. This rule has been complied with in this case. Mr. Chamier argues that this rule is confined to specific property lost. But looking to the rules that precede it we see no reason to restrict the rule to such cases. If a mode of service is prescribed and such rule is complied with, it is not open to the Company to plead that the notice is insufficient.

It is also argued before us that the packages contained trinkets of the value of more than one hundred Rupees. A few of the articles are apparently trinkets but their value is not more than one hundred Rupees. Therefore S. 75 of the Railways Act does not apply. Lastly it is contended that there is no reliable evidence of the value of goods despatched. The evidence is no doubt meagre and there are some suspicious circumstances. But we are unable to say that the Judge who heard the witnesses was wrong in believing that evidence.

We dismiss the Appeal with costs.

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1. (1898) I. L. R. 22 M. 137.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Sadasiva Aiyar.

Govindappa ... ... *Appellant**

v

Hanumanthappa ... ... *Respondent.*

Civil Procedure Code S. 583 (Act XIV of 1882)—Restitution of money taken in execution by assignee of decree—Reversal of decree and party to appeal—Blowing hot and cold.

A judgment-debtor from whom the assignee of a money decree has realised the decretal amount in execution is entitled to recover it back from the latter on a reversal of the decree in appeal, even though, the assignee was not brought on record in the appeal. Govindappa *v.* Hanumanthappa.

Tangijoghi v. *Hall*[1], followed ; *Lalta Prasad* v. *Sadiq Hussain*[2]. dissented from.

A party cannot be heard to say that the procedure to which he himself successfully objected in a former proceeding between himself and his opponent was itself the proper procedure to be pursued by the appellant.

Second appeal from the decree of the Court of the Subordinate Judge of Bellary in A. S. No. 73 of 1908, presented against the decree of the Court of the District Munsif of Hospet in O. S. No. 32 of 1908.

T. V. Muthukrishna Aiyar for appellant.

L. A. Govindaraghava Aiyar for respondent.

The Court delivered the following

Judgment :—*Abdur Rahim* J. This second appeal raises the question whether a judgment-debtor from whom the assignee of a money decree has realized the decretal amount in execution is entitled to recover it back from him when the decree is afterwards reversed, in appeal, if the assignee of the original decree was not brought on record in the appeal. I may mention that it is not necessary to consider the question whether the plaintiff could and should have sought his remedy for restitution by an application made to the court which executed the decree, for he did make such application and it was on the objection of the defendant that he was driven to institute the present suit and the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure.

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*S. A. No. 187 of 1911. 2nd October 1912.

1. (1899) I. L. R. 23 M. 203.
2. (1902) I. L. R. 24 A. 288.

Govindappa v. Hanumanthappa.

Abdur Rahim J.

Upon the merits what is urged in support of the judgment of the Subordinate Judge who has decided against the plaintiff's claim is that he not having impleaded the present defendant who had obtained an assignment of the decree of the first court as a respondent in the appeal against the decree, the decree of the appellate court cannot bind him because it might be that the decision of the appellate court was the result of collusion between the present appellant and the original decree-holder, the assignor of the defendant. Now no such fraud was ever pleaded and it is possible that if it was pleaded and proved that would be a sufficient answer to the suit. But in the absence of fraud it is difficult to see why the decree of the appellate court should not bind a person who has chosen to obtain an assignment of the decree of the first court. It is not contended that a judgment-debtor wishing to appeal against the decree is bound to make the assignee of the decree a party to his appeal though it might be open to him to apply for an order to that effect. The judgment-debtor's right of appeal is in no way affected by any intermediate assignment of the first court's decree. The assignee himself might apply to be brought on record in the appeal, and if he chose to leave the conduct of the appeal to the decree-holder it does not stand to reason that it should be open to him to question the decree that may be passed by the appellate tribunal. It is the decree of the latter court that is the final decree in the case being in substitution of the original decree and the doctrine of *lis pendens* clearly applies to an intermediate assignment of the original decree. The fact that the assignment was made before the appeal was filed cannot make any difference in this respect; (See *Settappa Gounden* v. *Muthiah Gounden*[1]), nor for reasons already stated, the fact that the judgment-debtor had knowledge of the assignment before he lodged his appeal.

On behalf of the respondent much reliance is placed on *Lalta Prasad* v. *Sadiq Hussain*[2], which is certainly a decision directly in favor. On the other hand the appellant cites in support of his contention the authority of *Tangi Joghi* v. *Hall*[3]. With all respect to the learned judges who decided the former case we are unable to accept their view of the law. The main reasoning on which that ruling is based seems to be that because in case the judgment-creditor himself had executed the decree of the first court and made over the money realized to a third person, the judgment-debtor who succeeded in appeal could not follow the money in the hands of the third person it must be held that where the assignee of the decree himself

1. (1908) I. L. R. 31 M. 268. 2. (1902) I. L. R. 24 A. 288.
3. (1899) I. L. R. 23 M. 203.

Govindappa v. Hanumanthappa. — Abdur Rahim J.

realized the decree in execution the judgment-debtor would have no cause of action against him, when the original decree is reversed in appeal. In my opinion the two cases are not based on the same legal considerations. Money is not ear-marked property and therefore in the first case there is no principle of law according to which it can be followed in the hands of a third person. But the other case is quite different. Here one person by a compulsory process of court obtains money from another and it is afterwards declared by a superior tribunal that the original process was justified. It seems to me that money so obtained under an invalid process of court must be treated as money had and received to the use of the person from whom it was received. That is the principle on which the doctrine of restitution which underlies S. 583 of the Civil Procedure Code of 1882 rests. The decision in *Tangi Joghi* v. *Hall*,[1] in my opinion supports the distinction which we have drawn between a case where the act complained of and in respect of which restitution is sought was done by the agency of the court and a case where such act was independent of any process of court. There is no doubt that the property of which restitution was sought in the Madras case was immoveable property but the principle of the decision is to my mind, equally applicable in a case like the present. That principle is well expressed in the observations of an American Court cited by the learned Judges in *Doraisami Aiyar* v. *Annasami Aiyar*,[2] "But the cases have no application where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of the court. He does not stand in the position of the actor in a suit who seeks the aid of a court to regain any possession lost by his own negligence or misfortune. On the contrary he is out of possession only because the court has wrongfully made room for him to get in......". The plaintiff in my opinion is entitled to restitution. The decree of the Lower Court must therefore be reversed and that of the District Munsif restored with costs in this court and in the Lower Appellate Court.

Sadasiva Aiyar J. I concur with my learned brother and I cannot usefully add anything to what he has said.

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1. (1899) I. L. R. 23 M. 203. 2. (1899) I. L. R. 23 M. 306 at 312.

Thuppati Veera Chetty v. Renga-charlu.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Thuppati Veera Chetti and another ... ... *Appellants.* (*Defendants.*)*

v.

Rengacharlu and another.... *Respondents.* (*Plaintiffs.*)

Limitation Act, art. 85—"Mutual, open and current account"—Essentials of—Test.

The essential feature of a "mutual, open and current account," is that there should be mutual demands; and it is not enough merely that the balances were constantly shifting in favour of one party or the other, though that would be an important factor in deciding the nature of the account.

Second appeal from the decree of the District Court of Salem in A. S. No. 288 of 07 preferred against the decree of the Principal District Munsif's Court of Salem in O. S. No. 67 of 06.

T. V. Muthukrishna Aiyar, for *T. V. Seshaghiri Aiyar* for appellants.

V. Purushothama Aiyar for *S. Varadachariar* for respondents.

The Court delivered the following.

Judgment:—This appeal is by the defendants and the question argued is that the suit is barred by limitation as there were no mutual open and current account between the parties. The District Munsif and the District Judge both held that there were such accounts between them. The District Munsif proceeds mainly on the ground that the accounts shewed that the balances were constantly shifting, sometimes in favour of one party and some times in that of the other. This is not the real test to be applied in deciding whether the accounts are mutual open and current. The test is whether there were mutual demands and not mere payments by one party to the other on account of a debt due by the former to the latter—see *Shiva Gowda* v. *Fernandes*[1] *Velu Pillai* v. *Ghose Mahomed.*[2] The fact that balance was shifting between the parties would no doubt be an important matter in considering whether there were mutual demands. As the Lower Courts seem to have proceeded on the footing that it would be sufficient if the balance was a shifting one, we cannot accept the finding that the accounts between

*S. A. 111 of 1911. 4th October 1912.

1. (1911) I. L. R. 34 M. 513.

2. (1893) I. L. R. 17 M. 293.

the parties were mutual, open and current accounts. The question must be decided by applying the test we have already mentioned. We reverse the decree of the Lower Appellate Court and remand the appeal for fresh disposal according to law.

Thuppati Veera Chetty v. Rengacharlu.

Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Veera Raghava Aiyangar and others. ... *Appellants.**

v.

Vellai Mooppai and others. ... ... *Respondents.*

C. P. C. S. 102.—Suit of small cause nature—Suit for recovery of melwaram—Declaration asked for—No Court fee paid—No Second appeal.

Where the prayer for declaration of right to receive melwaram is only incidental to the prayer for recovery of rent and no separate court fee was paid in respect of the declaration, no second appeal is competent in the case.

Veera Raghava Aiyangar v. Vellai Mooppai.

Second appeal from the decree of the court of the Subordinate Judge of Madura West in A. S. No. 679 of 1909 preferred against the decree of the Court of the District Munsif of Mana Madura in O. S. No. 256 of 1905.

K. Bhashyam Aiyangar for *S. Srinivasa Aiyangar* for appellants.

K. V. Krishnaswami Aiyar for respondents.

The Court delivered the following

Judgment:—The preliminary objection is taken that no second appeal lies in this case. We are of opinion that this contention should be upheld. The suit was one merely for recovery of rent. It is contended that the first prayer in the plaint is that the plaintiff's right to the melwaram of the land should be declared; but this can be treated as only incidental to the prayer for the recovery of rent. The cause of action as stated in paragraph 10 of the plaint is merely the non-payment of rent. No separate Court fee was paid for the declaration. There is absolutely nothing anywhere in the plaint to suggest that the prayer for declaration was treated as an independent one. The second appeal is dismissed with costs.

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*S. A. 404 of 1911. 15th October 1912.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Kamala Bhai ... ... *Appellant.**

v

Bhaghirathi Bhai ... ... *Respondent.*

Hindu Law—Stridhan—Succession—Step mother and maternal aunt.

A step mother succeeds to a maiden's stridhan in preference to the deceased maiden's maternal aunt.

Kamala Bhai v. Bhaghirathi Bhai.

Second appeal from the decree of the District Court of South Canara in A. S. No. 131 of 1910 preferred against the decree of the Court of the Temporary Subordinate Judge of South Canara in O. S. No. 73 of 1909.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

The Court delivered the following.

Judgment:—The plaintiff in the case claims the property sued for as the maternal aunt of a deceased Hindu maiden. The defendant is the step-mother of the maiden. The question for decision is whether the plaintiff is entitled to preferential rights over the defendant. The Bombay High Court held in *Tukaram* v. *Narayana Ram Chandra*[1] *Jangla Bhai* v. *Jetha Appaji*[2] that in default of both the mother and the father a maiden's property goes to the father's sapindas. The same view was accepted by the Calcutta High Court in *Dwarkanath Roy* v. *Sarath Chandra Singh Roy*[3] though in that case there was no contest between the mother and the father. In the Mitakshara there are no express texts dealing with the succession to the property of a maiden in default of the mother and the father; the text stopping with succession to the parents—the word " parents " being interpreted to mean the mother and then the father. But in the case of the property of a childless married woman the succession is carried further down. It is stated that the property goes to the parents and in default तत्प्रत्यासन्नानां which may be interpreted to mean 'to their sapindas' as Mr. Sitarama Rao contends. The Viramitrodya does not deal specifically with the succession to a maiden's property at all but provides for the succession to the property of a childless married girl in terms similar to those used in the Mitakshara. We see no reason for not accepting

*S. A. No. 217 of 1912. 8th October 1912.

1. (1911) I. L. R. 36 B. 339. 2. (1908) I. L. R. 32 B. 409.

3. (1911) I. L. R. 39 C. 319.

Kamala Bhai v. Bhaghirathi Bhai.

the view of the Bombay High Court, that the Sapindas both of the father and mother must be understood to mean the same person as the mother becomes a member of the father's family after the marriage. In this view, the defendant, as the wife of the deceased maiden's father, would be a nearer heir than the plaintiff. But Mr. Sitarama Rao contends that the father's widow could not inherit his property as a sapinda. He relies on the prevalent rule that female *Gotraja Sapindas* do not inherit as agnate relations taking the rank which they would be entitled to if their claims were based on sapinda relationship. With regard to the succession to a male's property this rule, no doubt has been enforced in this Court. *Balamma* v. *Pullayya*[1] and *Thayammal* v. *Annamala Mudali*.[2] But in the case of succession to Sridhanam property a daughter has been held to be entitled to inherit as Sapinda whether the succession has to be traced through the father or the husband. See *Manja Pillai* v. *Sivabhagyatha Bai*.[3] We see no reason why we should not adopt the same view with regard to the wife. Moreover there is much support in the Mitakshara for the view that a widow inherits her husband's property as his sapinda being one half of the husband's body.

We therefore agree with the District Judge that the plaintiff is not entitled to succeed in preference to the defendant and we dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Yellammal ... ... *Defendant* (Appellant).*

v

Ayyappa Naick... ... ... *Plaintiff* (Respondent).

Yellammal v. Ayyappa Naick.

Limitation Act, arts. 29, 62, 120—" Wrongful seizure "—" Moveable property "—" Legal Process "—" Compensation."

Per *Sundara Aiyar* J (*Sadasiva Aiyar* J dissenting) Where a debt due to the judgment-debtor was attached and the amount was subsequently voluntarily paid into court by the debtor of the judgment-debtor and withdrawn by the attaching creditor, a suit by the assignee of the debt from the judgment-debtor for a refund is not governed by art. 29 of the Limitation Act, and whether governed either by art. 62 or by art. 120 would be within time if brought within three years from the date of the withdrawal of the amount by the judgment-creditor :

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*S. A. No. 101 of 1911. 30th August 1912.

1. (1894) I. L. R. 18 M. 168. 2. (1895) I. L. R. 19 M. 35.

3. (1911) 21 M. L. J. 850.

Yellammal v. Ayyappa Naick — Sundara Aiyar J.

Meaning of the words "Seizure", "Moveable property" and "Compensation" dwelt on.

Second appeal from the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 385 of 1909 preferred against the decree of the Court of the District Munsif of Tuticorin in O. S. No. 310 of 1908.

V. C. Seshachariar, *V. S. Govindachariar* and *V. S. Kallabiram Aiyangar* for appellant.

T. R. Venkatrama Sastri for respondent.

The Court delivered the following

Judgment:—*Sundara Aiyar* J.—The question for decision in this second appeal is whether the plaintiff's suit is barred by limitation. The facts on which the question has to be decided are not disputed. The 4th defendant obtained a decree against one Perumal Naick in O. S. No. 37 of 1904. In execution of that decree she attached on the 1st of July 1909 a debt due to Perumal Naick from the 1st defendant in connection with a chit fund. The 1st defendant after the debt became payable to Perumal Naick on the 29th July 1905, paid the money into court on the 15th June 1906 having obtained an order permitting him to do so on the 6th November 1905. The plaintiff put in a claim petition objecting to the attachment and asserting that the debt was payable to himself by virtue of an assignment made to him by Perumal prior to the 4th Defendant's attachment. The claim petition was rejected. He then instituted a suit O. S. No. 458 of 1905 under S. 283 of the Civil Procedure Code to establish his right to the debt. In the meanwhile the 4th Deft on the 3rd November 1909, drew from Court the money which had been deposited by the 1st defendant. The plaintiff's suit O. S. 458 of 1905, was dismissed by the Court of first instance but he obtained a decree on appeal. The present suit for the recovery of the money drawn by the 4th Defendant from Court was instituted in 1908, within three years after it was drawn by the 4th Defendant.

Both the Lower Courts have held that the suit is not barred by limitation. The Subordinate Judge is of opinion that article 62 or 120 of the 1st schedule to the Limitation Act is applicable to the case.

The contention in second appeal is that the suit is governed by Art. 29. That article is in these terms:—"For compensation for wrongful seizure of moveable property under legal process." The period fixed is one year from the date of the seizure. The 4th defendant

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has several difficulties to overcome before she could make out that this article is applicable. Was the debt *seized* under legal process ? Was the alleged seizure of any moveable property ? Is the suit one for compensation ? and if so is it one for compensation for wrongful seizure ? If any one of these questions is answered in the negative the contention must fail. I shall deal with each one of them in order.

I am of opinion that there was no seizure under legal process in this case. The debt was attached presumably according to the procedure laid down in the Civil Procedure Code for the attachment of debts, that is by giving notice to the debtor directing him not to pay it to the creditor and to the creditor enjoining him not to receive it from the debtor. It is hardly necessary to say that every attachment by a court is not a seizure. It is not so where immoveable property is attached; nor is it so in the case of attachment of a debt. It was suggested that when the 1st defendant paid the money into Court on the 6th November 1905, it must be taken to have been seized by the Court. I do not agree with this argument. The money was paid into the Court by the 1st defendant voluntarily after obtaining permission to do so. The Procedure Code gave him a right to make such an application. On the other hand the court could not have compelled him to make the payment. The word "seize" in my opinion means taking hostile possession and not taking possession of what another voluntarily gives as the 1st defendant did in this case in order to get rid of his own responsibility whoever might be entitled to the money. In Webster's Dictionary the word is interpreted thus :—"To take possession by force with or without right, to take possession by virtue of a warrant or legal authority." The Court used no force in this case nor was the debt taken hold of under a warrant of Court. To seize is the same as to capture. It is impossible to speak of a thing which is freely given as being captured. In *Rupabai* v. *Adimulam*[1] *Kernan* and *Parker* JJ refused to uphold the contention that money deposited in Court and received by it and subsequently paid over to a party could be taken to have been 'seized' within the meaning of art. 29. In *Jagjivan Javerdhas* v. *Gulam Jilani Chaudhri*[2] which was a case where an allowance due to the judgment-debtor from Government was attached, no question was raised as to whether there was a seizure. No authority has been cited in support of the defendant's position that there was a seizure in this case.

1. (1888) I. L. R. 11 M. 345   2. (1883) I. L. R. 8 B. 17.

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The next question is whether a debt due can be regarded as moveable property within the meaning of this article. I am of opinion that it cannot. It is not necessary to consider whether if money is actually seized by the court in execution of a decree it could not be regarded as moveable property under the article. The method by which a court makes debt due to the judgment-debtor available for the satisfaction of the judgment-creditor's decree against him is different from the method adopted for making available for the same purpose moveable property which the court can immediately lay hold of through its officers. The article applies in my opinion only where the court through it officers is able to reduce the property to its possession, and does so on the motion of the judgment-creditor. I see no reason for straining the words of the section so as to make it applicable to cases where a very different method of seizing property belonging to the judgment-debtor is prescribed.

The third question is whether this can be regarded as a suit for compensation at all. The word "compensation" has been interpreted very widely in the decisions of the High Courts, given in the case of suits to which other articles of the Limitation Act not relating to compensation might appropriately be applied. This has been particularly the case in the application of Art. 116 which makes provision for suits "for compensation for the breach of a contract in writing registered." Thus it has been applied to a suit for rent upon a registered contract. *Vythilinga Pillai* v. *Thatchanamoorthi Pillai*[1] to which article 110 would in terms apply, to suits against agents provided for in specific articles (*Harendra Kishore Singh* v. *The Administrator-General of Bengal*[2] and *Jogesh Chandra* v. *Benode Lal Roy*[3], to a suit on a bond (*Magaluri Garudiah* v. *Narayana Rungiah*[4]. See also *Runga Reddi* v. *Chinna Reddi*[5] which was a suit for a settlement of accounts. The Allahabad High Court has refused to apply Article 116 to suits for rent—*Ram Narain* v. *Kamta Singh*[6] and *Juggi Lal* v. *Sri Ram*[7]. I may with all humility state that it appears to me that the scheme of the Limitation Act has been inadequately considered in the view that has been adopted with respect to the scope of art. 116. The Act has prescribed specific articles for suits on various kinds of contract, such as for balance of money advanced on payment of goods to be delivered; for the price of goods sold and delivered; for the price of trees or growing crops sold; for the price of work done; for money

1. (1880) I. L. R. 3 M. 76.
2. (1885) I. L. R. 12 C. 357.
3. (1909) 14 C. W. N. 123.
4. (1881) I. L. R. 3 M. 359.
5. (1891) I. L. R. 14 M. 465.
6. (1905) I. L. R. 26 A. 138.
7. (1912) 10 A. L. J. 1.

lent: for money deposited under an agreement for re-payment. Articles 51 to 60. See also articles 64, 66, to 89, 101, 102, 106, 110, 111 and 112. It also provides for several kinds of suits which would be regarded in English Law as actions *quasi ex-contractu*, such as for money payable, to the plaintiff for money paid for the defendant, for money payable by the defendant to the plaintiff, for money received by the defendant for the plaintiff's use; for money payable for interest upon money due from the defendant to the plaintiff. Articles 61, 62, 63. See also Articles 96, 97, 99 and 100. In one sense every suit for obtaining the benefit of a contract, except a suit for its specific performance, may be regarded as one for compensation for the breach of a contract; for until the contract is broken, the plaintiff would have no right to sue. But it is to my mind very doubtful whether the word "compensation" is used in this comprehensive sense in the schedule. Where money is lent to a person on the promise of returning an equivalent amount it appears to be a straining of the scheme of the Act to regard a claim for the re-payment of the money as one for compensation. Where a person on the ground that the money due to him has been received by another sues for the recovery of an equivalent amount, I cannot but hesitate to say that the suit is to be regarded as one for compensation. It is, however, unnecessary for me to express a decided opinion on this question which is one of great importance as I am clearly of opinion that assuming that the present suit can be regarded as one for compensation or damages, it is not a suit for compensation for wrongful seizure of property under legal process.

Now when property is attached by a court by seizure, it is brought into the custody of the court and in cases where seizure is not possible steps are taken to prevent the debtor from utilising the property otherwise than for the purpose of satisfying the judgment-debt for which the attachment is made. In the former class of cases it remains in *custodia legis*. It may never be sold at all. The judgment-debtor or other owner would be entitled to receive it back from the court if the attachment has been wrongly made; and if the property is sold and if the proceeds are brought into court, it still remains in the hands of the court for the benefit of the person to whom the property really belongs. Not until the proceeds are paid away, is the person really entitled deprived of his property and its value. I entirely agree with the observations of Sankaran Nair J. on this point in *Narasimha Row* v. *Ganga Raju*, [1] and I am with all deference unable to agree with the view taken by the learned Chief Justice in that case. It would not be open to the

1. (1908) I. L. R. 31 M. 431.

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real owner of property seized by the court to sue for the value of the property on the mere ground that it has been seized. Again, if A's property is attached in execution of a decree against B, A cannot sue for its value nntil he has established his right by a claim petition, or by a regular suit if the claim petition fails; and nothing but the adoption of this procedure would prevent the court from selling the property and directing the proceeds of the sale to be applied for the satisfaction of the judgment debt. Further Article 29 gives only one year's time from the date of the seizure. A person failing in a claim petition has one year from the date of the order on the petition for filing a suit to establish his right. It seems to be unreasonable to hold that he has only one year for a suit to recover the value of the property from the date of the seizure, seeing that he could not within that time establish his right to the property. Such a suit in many cases would take more than a year from the date of the seizure. It may take a considerably longer time, for he may fail in his claim petition and he may fail also in his regular suit in the 1st Court or even in two courts before achieving success finally.

Sankaran Nair, J. points out another serious difficulty in upholding the defendant's contention. The learned judge observes: "If the owner of the moveable property gets his compensation from the plaintiff who attached these crops before judgment, and that plaintiff's suit is dismissed, to whom is the court to deliver the property? Not to the owner, who has got his compensation, not to the defendant as whose property it was attached, because it has been declared not to belong to him in the suit which awarded compensation; not to the plaintiff who failed in the suit and never claimed it to be his property." The learned Chief Justice in his judgment in *Narasimha Row* v. *Ganga Raju*,[1] refers to article 30 and 31 in support of his construction of article 29; but both these articles expressly refer to cases where goods entrusted to a carrier are lost or not delivered at all as well as to cases where they are injured or where their delivery is delayed. The learned judge says that the injury to the plaintiff is the seizure of his property. But his property is not lost by the seizure. How can there be a cause of action for damages which would accrue only if and when it is lost? I cannot treat the question as only one of the measure of the damages sustained by the seizure. In *Ramasami Aiyar* v. *Muthusami Aiyar*.[2] *Subramania Aiyar* and *Miller*, JJ. held that where property is seized by a Magistrate and reduced to his custody and is afterwards delivered to some other person, time will begin to run in a suit for the

1. (1908) I. L. R. 31 M. 431. 2. (1908) I. L. R. 30 M. 12.

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recovery of its value only after the Magistrate's delivery to the defendant and that limitation will not commence so long as the Magistrate retains the custody of the property. The learned Chief Justice's judgment does not show how that case was distinguishable from the case before His Lordship. The dictum in *Murugesa Mudaliar* v. *Jattaram Davay*,[1] that article 29 is applicable to a suit for the recovery of the value of the goods attached is opposed to the pronouncement in the later case of *Ramasami Aiyar* v. *Muthusami Aiyar*.[2] Another case which is strongly relied upon by the learned vakil for the defendant is *Jagjivan* v. *Chaudri*,[3] already referred to. There the allowance due to the judgment-debtor was drawn by the judgment-creditor several years after the attachment and the suit was for the recovery of the amount so received. *West* and *Nanabhai Haridas* JJ. held that art. 29 was applicable. *West* J. held that S. 283 of the Civil Procedure Code would be applicable to a suit for the recovery of an ox or goat wrongly seized in execution; but to a suit for compensation for damage done to it or for the plaintiff's loss of the use of it or the recovery of the value of the thing. Article 29 was applicable and that the value of the thing was only one of the elements making up the damages. The learned judge regarded all suits for money as claim for compensation. He says that in a claim for compensation for wrongful seizure the value of the articles seized blends with other items of damages, such as the loss of the use of the article or damage sustained by injury to it. It is difficult to see how any blending can take place when the cause of action for the recovery of the value arises only after the expiry of the period of limitation provided in article 29. With all respect I am unable to agree with the opinion of *West* J. In *Lakshmipriya Chowdhurani* v. *Ramakanta Saha*,[4] the Calcutta High Court held that a suit to recover the surplus proceeds of sale held under regulation VIII of 1819 wrongfully taken out by the defendant in execution of a decree against a third party was not governed by article 29, dissenting from *Jagjivan* v. *Chaudri*[3] and that that article applies only to suits where a person is damnified by the seizure itself. I am of the same opinion for the reasons I have already stated. Apart from the meaning of the article and the question whether the damage sustained by the loss of the article may not be claimed as part of the damages sustained by the seizure, I am of opinion that the plaintiff is entitled to waive the seizure and to sue the defendant for money belonging to him and wrongfully received by the defendant. " If a man's goods are taken by an act of

1. (1900) I. L. R. 23 M. 621.
2. (1908) I. L. R. 30 M. 12.
3. (1883) I. L. R. 8 B. 17.
4. (1902) I. L. R. 30 C. 440.

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trespass and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible entry, or waiving the force he may maintain trover for the wrong, or waiving the tort he may sue for money had and received. Thus though a trespass to realty is committed and portions of it, such as, minerals, timber, or fixture are severed the injured party waiving the unlawfulness of the severance may sue in trover for the value of the severed chattels; or if a man is unlawfully deprived of the possession of his property which is afterwards sold or pledged the owner may affirm the transaction and sue the wrongdoer on a contract implied in law to refund the proceeds." Clerk and Lindsell on Torts (3rd Edn. p. 151). See also Bullen and Leake on Precedents of Pleadings (5th Edn. p. 300) where the English cases are collected. In *Danmull* v. *British India Steam Navigation Co.*[1], *Wilson* J. observes:—"Suppose a lessee under a registered lease in Calcutta to sue his landlord for breach of covenant for quiet enjoyment, could the landlord set up in reply, 'true I have broken my contract, but what I did amounted also to a trespass, and in as much as the period of limitation for a trespass is a short one, your suit on the contract is barred.' The answer would be 'I do not care whether there was a trespass or not, you have broken your contract and I am suing you as for the breach, not for trespass." The question in that case was whether in answer to a suit for breach of contract for non-delivery of goods under a bill of lading, it was open to the defendant to set up the plea that the goods were lost and that the suit was therefore barred under art. 30 of the Limitation Act. He was not permitted to set up the plea as in his defence he denied the receipt of the goods. But *Wilson* J. went further and held that, even if the loss had been pleaded in the original defence, it could not succeed. In the *Rajputana Malwa Railway Co-operative Stores* v. *The Ajmere Municipal Board*,[2] the Allahabad High Court also held that, although the plaintiff might have been entitled to sue for compensation, it was equally open to him to frame his suit as one for money had and received if he had a cause of action for a suit of the latter description and that it was open to him to waive the tort in the receipt of the money.

In *Narmadabhai* v. *Bavani Shankar*[3] the Bombay High Court held that the plaintiff in the suit could frame his action either as for the recovery of a deposit or for breach of contract. See also *British India Steam Navigation Co.* v. *Hajee Mahomed Esack*,[4] referred to and approved by Wilson, J. in *Danmull* v. *British India Steam Navigation Co.*[1] When the 4th defendant after his attachment received

1. (1886) I. L. R. 12 C. 477.
2. (1910) I. L. R. 32 A. 491.
3. (1902) I. L. R. 26 B. 430.
4. (1886) I. L. R. 12 C. 477.

from court the money to which the plaintiff was entitled, I am of opinion that that fact gave the plaintiff a cause of action to recover the money received by the 4th defendant. He could have no cause of action for it until the money was paid out. In this case the plaintiff could not have instituted his suit until his right to the money was established by the decree of the appellate court in his suit instituted under S. 283. I hold that article 29 is not applicable to this case. It is unnecessary to decide whether the article applicable is 62 or 120 as in either case the suit is in time. I would therefore dismiss the second appeal with costs.

Sadasiva Aiyar J. In this case I have the misfortune to differ from my learned brother. The facts have been stated in the judgment of my learned brother which I have had the advantage of perusing and I need not repeat them. The short question in this case is whether a suit for recovery of money from the 4th defendant on the ground that the 4th defendant wrongfully carried away from the court money belonging to plaintiff, money which was paid into court owing to 4th defendant's having effected a wrongful attachment in execution of the 4th defendant's decree against one Perumal Naik is barred by limitation. It is contended by plaintiff and found by the lower court that the attachment was wrongful. The 1st defendant who owed the debt to 4th defendant's judgment-debtor Perumal Naiken paid the attached money into court in June 1906 and the Court took the money into its custody, the deposit of money being undoubtedly the result of the wrongful attachment made by the 4th defendant. The plaintiff who claims the money as the assignee of Perumal Naik has brought this suit in September 1908 more than two years after the money came into possession of the court.

In my opinion art. 29 of the Limitation Act must be applied to this case. It was argued by the respondent's learned Vakil that it does not come under art. 29 because there was no 'seizure' of the money by the Court. That the attachment and taking possession by the Court of the moveable property of a third party at the instance of the decree-holder would amount to a wrongful seizure of that property by the court has been held in *Murugesa Mudaliar* v. *Jataram Davey*[1]. That a wrongful attachment of money is also a wrongful seizure of moveable property and is governed by art. 29 has held been in *Jagjivan* v. *Chaudri*[2]. In law the word 'seize' means 'to make possessed, to put in possession of' (See Anandale's English Dictionary). 'Seize' also means 'to take hold of, to take possession of.' I do not deny that frequently the idea of

1. (1900) I. L. R. 23 M. 621. 2. (1883) I. L. R. 8 B. 17.

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suddenly laying hold, the idea of taking by force is also in many cases connected with the word 'seize'; but after consulting Webster's and Century Dictionaries, I am satisfied that the word 'Seize' when used both by Lawyers and laymen has also frequently the meaning of mere taking possession of and reducing to custody. Even if the verb 'seize' is more frequently connected with the idea of force or suddenness the noun 'seizure' is not so frequently employed with that implication. The word in art. 29 of the Limitation Act is the noun form 'Seizure'. The mere taking into possession can in my opinion be called 'seizure' especially if a claim of legal right is also put forward as justifying such possession even if no force is used. Webster says that the root meaning of 'seize' is "put (one self) in possession of". One of the first set of meanings given by him is "to reach and grasp". In Law he says that it means "to have possession or right, of possession". As regards the noun form 'Seizure' one of the first set of the meanings given by him is a taking into possession. The second set of meanings is "Retention with one's own grasp or power; hold; possession; ownership." The Century Dictionary says that "seizure" means also "The act of seizing; the fact of being seized or being in possession of any thing; possession; hold." I think therefore that the words "wrongful seizure" in Art. 29 includes mere wrongful taking of possession. (See also *Multanchand* v. *Bank of Madras*[1] which shows that art. 29 applies to a case when the attaching officer made the attachment without "taking physical possession" (the attached jaggery kept inside a locked warehouse.) The case in *Rupabhai* v. *Adimulam*,[2] where it was held that money which has been deposited in court by a mortgagor who had sued for redemption and who voluntarily paid the money for the redemption of the mortgaged property in pursuance of redemption decree obtained by him was not property wrongfully seized by the court is not relevant to the question now in dispute. There was no order for attachment in that case and the money was not paid into court in consequence of any order for attachment wrongfully made as against the plaintiff in the subsequent suit. Under O. 21 r. 52, if the property of the judgment-debtor is in the custody of any court or public officer, the attachment is made by a notice to the court or officer requesting that the property may be held subject to the further orders of the court. If a further order is passed to send such property to the court which issued the order of attachment and if this latter court takes possession of the property on its being so sent, does not this latter become 'seized' of the property? If the attachment was wrongful as

1. (1903) I. L. R, 27 M. 346 2. (1888) I. L. R. 11 M. 345.

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against the plaintiff of the latter suit, will not the possession of the property by the court be wrongful seizure by legal process. Let us take the case where the moveable property attached was in possession of the judgment-debtor himself in his house though the property really belonged to a third party. When the process-server tells the judgment-debtor that he has come to attach the property in the judgment-debtor's house as the judgment-debtor's the judgment-debtor voluntarily in order to injure the owner and because he fears any force or violence at the hands of the process-server hands over the property to the process-peon, can it be held that because there was no force used, there was no 'seizure'? I am clearly of opinion that money which comes into the hands of the court in consequence of a legal process of attachment is money 'seized' by the court and the definition in Webster to take possession by legal authority covers the taking possession by the court of such money. In the case in *Rupabhai* v. *Adimulam*[1] the court took possession of money which was deposited by the decree-holder in the former suit in order that he might obtain the benefit of his redemption decree and not on account of any threatened legal process against him, or on account of any order of Court directed against him.

The other question argued by the respondent's learned vakil is whether the present suit can be regarded as a suit for compensation for the wrongful seizure of money by the court (as if such money was available to satisfy 4th defendant's decree against Perumal Naicken). Both in *Jagjivan* v. *Chaudri*[2] and in *Narasimha Rau* v. *Ganga Raju*[3] it was held that a suit for money claimed as damages caused to the plaintiff by the act of defendant in making a court wrongfully seize the money or moveable property belonging to the plaintiff and by the subsequent disbursement of the money or the sale proceeds of the moveable property belonging to the plaintiff and by the subsequent disbursment of the money or the sale proceeds of the moveable property was governed by art. 29 to which the one year's rule of limitation applies. There is only one cause of action for the plaintiff *viz.*, the wronful seizure by the court of property belonging to plaintiff and all subsequent and consequential events and the damages arising from those events are properly attributed to the original wrongful seizure. I am aware that a good deal can be said to support the dissentient judgment of Sankaran Nair J. in the case in *Narasimha Rau* v. *Ganga Raju*[3] but on the principle of *stare decisis* and having regard to the fact that in *Narasimha Rau* v.

1. (1888) I. L. R. 11 M. 345.
2. (1887) I. L. R. 8 B. 17.
3. (1908) I. L. R. 31 M. 431.

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Ganga Raju[1] the observations in the earlier case in *Murugesa Mudaliar* v. *Jataram Davey*[2] are followed, I do not think it, advisable to try to change the course of the decisions on this question. There is also this question of public policy to be considered that persons who are aggrieved by a wrong done under the protection and in consequence of a legal process should come into court within a short time to pursue all their remedies and to obtain all the reliefs for such wrong. The argument based on S. 283 of the Civil Procedure Code which makes provision for a special procedure whereby a claimant to attached property can establish his right by a suit brought within a year of the attachment was relied upon by the respondent's learned vakil to find an argument on the score of hardship *viz.*, that if the claim proceedings and the suit to establish his title are pending for more than a year from the date of seizure in the present case, the plaintiff would be put to a hardship when he brings his suit for damages after he establishes his title. This argument was also advanced in the case in *Narasimha Rau* v. *Ganga Raju*[1] but the learned Chief Justice failed to see how the provisions of S. 283 could have the effect of postponing the time for a suit governed by the express provisions of art. 29 of the Limitation Act. The case in *Ramasami Aiyar* v. *Muthusami Aiyar*[3] was not a case of the seizure by a civil court at the wrongful instance of a decree-holder but it was by a Magistrate partly under his own search warrant and partly by the police. The custody of the Magistrate under those circumstances was held to be for the benefit of the owner whether plaintiff or defendant and it was further held that plaintiff's cause of action for recovery of the paddy wrongfully delivered to defendant by the Magistrate was governed by art. 49 of the Limitation Act. Art. 29 was never relied upon in that case and was not even quoted in the judgment. This case in *Ramasami Aiyar* v. *Muthusami Aiyar*[3] seems to have been distinguished by the learned Chief Justice evidently on the ground that the seizure by a magistrate is not the wrongful seizure contemplated by art. 29. See *Narasimha Rau* v. *Ganga Raju*[1]. I am aware that the case in *Jagjivan* v. *Chaudri*[4] has been disapproved in *Lakshmi* v. *Ram*[5]; but it has been approved in *Narasimha Rau* v. *Ganga Raju*[1] and until the case in *Narasimha Rau* v. *Ganga Raju*[1] is properly overruled by a decision of the full Bench of this Court. I do not think myself at liberty to hold that art. 29 does not apply to this case or to hold that the plaintift obtains another distinct cause of action on the date when the

1. (1908) I. L. R. 31 M.431. at p. 434.
2. (1900) I. L. R. 23 M. 621.
3. (1908) I. L. R. 30 M. 12.
4. (1883) I. L. R. 8 B. 17.
5. (1902) I. L.R. 30 C 440.

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4th defendant withdrew the money from the Court and could save himself from the bar of limitation by putting forward this latter date as the date of an alternative cause of action. This article 29 seems to have been applied in *Ramasami Aiyangar* v. *Venkatachalla Chetti*[1] decided by *Abdur Rahim* and *Philipps* JJ. who applied a liberal interpretation to its terms following the principle of the ruling in *Narasimha Rau* v. *Ganga Raju*[2].

In the result I would reverse the judgments of the lower Courts and dismiss the plaintiff's suits, but under the circumstances I would make no order as to costs in any of the Courts.

Sundara Aiyar J.—My learned brother is of opinion that the suit is barred by limitation. The result is that under S. 98 C. P. C. the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph Benson, Officiating Chief Justice and Mr. Justice Sankaran Nair

Valli Ammal ... ... *Appellant.* (Plaintiff.)*

v.

The Corporation of Madras ... *Respondent.* (Defendant.)

Valli Ammal v. Corporation of Madras.

Madras Acts—City Municipal Act III of 1904, S. 287—"Final" Meaning of Suit for an injunction—Parties—Jurisdiction of Civil Courts—Standing Committee—Status and functions.

Civil courts have jurisdiction to entertain a suit against the President of the Madras Corporation for an injunction restraining him from demolishing a building under S. 287 Cl. 2 of the Madras Municipal Act.

A suit for an injunction is the proper remedy in the case and the President who passed the order under the section is the proper party and not the Standing Committee.

When a right and an infringement thereof are alleged, a cause of action is disclosed; and unless there is a bar to the entertainment of such a suit the ordinary Civil Courts are bound to entertain the claim.

The Standing Committee of the Madras Corporation is not an independent body authorized to settle finally disputes between the tax payers or houseowners and the Corporation whose members they are and of which they form part; and they cannot be treated as a special tribunal constituted to decide claims between the house owners and the corporation under S. 287 of the Madras Municipal Act, so as to oust the jurisdiction of the ordinary Civil Courts.

The word "final" in S. 287 of the Madras Municipal Act refers to proceedings before the Corporation and is intended to bar an appeal from the Standing Committee to the general body of the Commissioners and not to shut out the jurisdiction of courts.

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*C. C. C. A. No. 5 of 1911. 8th October 1912.

1. (1911) 12 Ind. Cases 406.
2. (1908) 31 M. 431.

Valli Ammal v. Corporation of Madras.

Appeal from decree of the City Civil Court, Madras in O. S. No. 553 of 1910.

This was a suit for an injunction to restrain the defendant Corporation from demolishing the rooms in plaintiff's house. Defendant pleaded that the court had no jurisdiction and that the suit as framed for an injunction was not proper. The judge found in favour of the plaintiff on the question of jurisdiction and dismissed plaintiff's suit on the 2nd question.

V. Ramesam for *T. R. Venkatarama Sastri* for appellant.

T. V. Seshagiri Aiyar for *K. Srinivasa Aiyangar* and *P. Duraisami Aiyengar* for respondents.

V. Ramesam contended that the suit as framed for an injunction was proper. *Bolaram Choudri* v. *The Corporation of Calcutta,*[1] does not at all consider whether *mandamus* or injunction is the proper relief to be asked for in cases of this nature. The rooms in question have been in existence for a long time. There is no question of *mandamus* in this case.

T. V Seshagiri Aiyar. The proper person to be sued is the Standing Committee and not the Corporation. The Standing Committee alone ordered the demolition of the rooms through its Ex-Officio Officer the President. Ch. II of Act III of 1904, Ss. 8 and 9 define 'Standing Committee' and 'President.' Each is given special powers One ought not to interfere with the other, Ss. 17, 18 and 20 except when specially provided for. S. 287, Cl. 3 provides that the decision of the Standing Committee shall be final. S. 456 refers to suits. Any person aggrieved by the failure to do any work imposed on the Corporation shall bring a suit. S. 457. There are three Officers. The President, Standing Committee and the Corporation. The Standing Committee is the final authority in all matters. *Bolaram Choudhuri* v. *The Corporation of Calcutta,*[1] The Corporation will not be liable for any act of the Standing Committee.

S. 287 says that the decision of the Standing Committee shall be final. Plaintiff having submitted to the decision of the Standing Committee which is final he cannot be allowed to have recourse to Civil Courts. *Bai Shankar* v. *Municipal Council of Bombay*[2].

The Court delivered the following.

Judgment:—The plaintiff is the owner of house and premises No. 36 Singanna Chetti Street within the Municipality of Madras.

1. (1909) I. L. R. 36 C. 671. 2. (1907) I. L. R. 31 B. 604.

She applied for and obtained permission, from the officer competent to grant the same, to carry out certain repairs to her house in April 1909. The President of the Corporation was of opinion that, taking advantage of this permission granted to her, she had made other considerable alterations and additions to her house and ground without his sanction; and he accordingly made a provisional order under S. 287 clause (1) of the Madras City Municipal Act III of 1904 requiring her to remove those alleged additions. That provisional order was afterwards confirmed by him under S. 287 clause (2) of the Act. The plaintiff appealed against it to the Standing Committee who declined to interfere. Her case is that there were no additions or alterations as stated by the President but that the four rooms which have been ordered to be demolished had been in existence for more than 20 years and that therefore neither the President nor the Corporation was entitled to ask her to demolish the same on the ground alleged. She therefore prays for an injunction to restrain the defendant (the Corporation of Madras) from demolishing these four rooms. It is necessary at this stage to notice only the following plea advanced in paragraph (3) of the written statement:— "The order of the Standing Committee referred to in paragraph 4 of the plaint filed herein having become final under S. 287 (3) of the Act the suit is not maintainable against the defendant Corporation at all; and the plaintiff has misconceived her remedy if any."

The City Civil Court Judge held that the plaintiff was not barred from bringing the suit on the ground that the Standing Committee had confirmed the order of the President but he held that the suit for an injunction in his court is not the proper remedy and that the plaintiff should apply to the High Court by way of *mandamus* and for this position he relied upon the decision in *Bolaram Chowdhry* v. *The Corporation of Calcutta*[1]. This is an appeal from his judgment.

The case referred to, does not support the proposition that the proper remedy is by way of *mandamus*. The question for decision in that case was not whether an injunction or a *mandamus* was the proper remedy, nor did the judge decide that a suit for an injunction will not lie to restrain the Corporation from committing an act which is improper or illegal.

Mr. Seshagiri Aiyar however has argued two other questions in support of the decree of the lower court. His first contention is that the Standing Committee having confirmed the order of the President

1. (1909) I. L. R. 36 C. 671.

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that these buildings ought to be demolished, no suit will lie at all as section 287 Clause (3) says that such order is final. It is rightly conceded that if the President or Municipal Corporation issues an order to demolish a building on the ground that it is a new building constructed against the provisions of the Act but as a matter of fact the building is not one so constructed but is an old building then the plaintiff has a grievance for which there should be a remedy. When a right and an infringement thereof are alleged, a cause of action is disclosed: and unless there is a bar to the entertainment of such a suit the ordinary civil courts are bound to entertain that claim. In this case it is not alleged that there is any express provision of law to the effect that no such suit shall lie. What is contended is that there is a bar by implication because S. 287 says that the decision of the Standing Committee shall be final.

It is no doubt true that where a special tribunal has been created or empowered to afford redress it has been held that there is an implied prohibition against a suit being filed in the ordinary courts. This Act itself furnishes an instance of such a tribunal. All complaints, for instance, in respect of any tax or toll are first to be heard and decided by the President and two Commissioners; and against an order so passed by them there is an appeal to the Magistrates who may refer the matter to the High Court for their decision and are bound to do so whenever a question of law is involved; and the Magistrates are required to dispose of the case in conformity with the terms of the order of the High Court. This is a special tribunal empowered to deal with these questions and its decisions on such questions have been held to be final by this court. See also *Bhai Shankar v. The Municipal Council of Bombay*[1].

The question then for decision is whether the Standing Committee is a special tribunal empowered to deal with this question finally. The Standing Committee is composed of the President and eight members. These eight members are all Commissioners of the Corporation. Their powers are defined by certain sections of the Act. (See Ss. 17, 20 and 286.) They form in fact a part of the Corporation and they carry out the duties of the Corporation in accordance with the provisions laid down by the Act. They cannot be held to be an independent body authorised to settle finally disputes between the tax payers or house owners and the Corporation whose members they are and of which they form part. We are therefore of opinion that they cannot be treated as a tribunal to decide such claims. We take it that the word "final" in S. 287

1. (1907) I. L. R. 31 B. 604.

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refers to proceedings before the Corporation, and is intended to bar an appeal from the Standing Committee to the general body of the Commissioners and not to shut out the jurisdiction of the courts.

It was also argued before us that the plaintiff was wrong in bringing this suit against the Corporation, that her remedy, if any is against the Standing Committee and for this contention the decision in *Bholaram Chowdhry* v. *The Corporation of Calcutta,*[1] was relied upon; but that was a suit brought for the purpose of compelling the Corporation to do an act which according to the Act, it was the duty of the Standing Committee to perform and therefore it was held that the suit should have beed brought against the Standing Committee. It has no application to the present case. In this case the President was acting on behalf of the Corporation. We disallow this contention.

We set aside the decree of the lower court and direct the judge to restore the suit to his file and proceed to dispose of it in accordance with law.

The appellant is entitled to the costs of this appeal. The costs hitherto incurred in the lower court will be provided for in the final decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Boddam.

Kora Rangan and others *Petitioners* (Accused.)*

Kora Rangan In re

Criminal Procedure Code. S. 110—"Within the local limits of his jurisdiction."

It is not necessary that the person from whom security is taken under S. 110 Criminal Procedure Code should be a person *resident* within the local limits of the jurisdiction of the Magistrate.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of the Sessions Judge of Chingleput in Criminal Miscellaneous Case No. 12 of 1904 referred under S. 123 (2) Criminal Procedure Code by the Joint Magistrate of Chingleput Cr. Mis. Case. No 30 of 1904 on the file of the Joint Magistrate of Chingleput.

E. R. Osborne Counsel and *K. Kuppusami Aiyar*, for Petitioners.

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*Cr. R. C. No. 355 of 1904. Cr. M. P. No. 264 of 1904. 14th November 1904.

1. (1909) I. L. R. 36 C. 671.

Kora Rangan
In re

The Public Prosecutor contra.

The Court made the following

ORDER:—It is urged by Counsel for the Petitioners that some of the persons who have been required to give security for good behaviour reside outside the jurisdiction of the Magistrate who took action under S. 110 Criminal Procedure Code and our attention is drawn to the case of *Ketaboi* v. *Queen Empress*[1].

In that case it was held that according to the true construction of S. 110 the Magistrate would have no jurisdiction to deal with the case unless the person proceeded against was "residing within the local jurisdiction of the Magistrate".

With all respect to the learned judges who decided that case we are not prepared to follow their decision. The words of the section are: "Whenever.........a Magistrate receives information that any person within the local limits of his jurisdiction.........is by habit a robber" and so forth, he may proceed under the section. Had the legislature intended to restrict the jurisdiction, of the Magistrate to persons residing within the local jurisdiction, nothing would have been easier than to have said so; but the legislature has refrained from imposing this limitation, and we are not justified in importing it into law. The law simply says "any person within the local limits" and this we understand to mean any person who is within the local limits at the time when the Magistrate takes action under the section. The object of the section is the prevention of crime, and its object would in our opinion be liable to be defeated if its scope were restricted to persons residing within the Magistrate's jurisdiction. As the Sessions Judge points out, if that were so, we should have this absurdity that the Magistrates in British India would have no power to proceed under the section against bad characters, no matter how desperate and dangerous they might be who reside in French or other foreign territory, though they might infest in villages in British India and be well known to the authorities as habitual thieves; nor would any Magistrate have power to proceed against those gangs of criminals who have no residence anywhere but wander from District to District throughout the year.

We dismiss the Petition.

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1. (1900) I. L. R. 27 C. 993.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair.

Panikkarchatt Ukkajithan-thavita Puthia Purajil Abdulla and others. ... ... *Petitioners**

v.

Panikkarath Ukkayitham-tavita Puthia Purajil Mirthur. ... ... *Respondent.*

Act XIX of 1841—Curators in cases of Succession Act Ss. 3 and 4—Appointment of Commissioner to make an inventory when valid—Malabar Law—Death of Karnavan—Devolution of property.

Act XIX of 1841 does not apply to cases where property lapses by survivorship, as in the case of the death of a Karnavan of a Malabar tarwad, when the property in his possession, whether tarwad property or self-acquisition, goes to his tarwad.

Puthia Purajil Abdulla *v.* Puthia Purajil Mirthur.

An order appointing an officer to take an inventory otherwise than in the course of an inquiry contemplated by S. 4 is bad in law.

Obiter:—The Act presupposes cases of succession and if there are directions as to the disposal of the property the judge should give effect to them in a summary proceeding without considering their validity.

Petitions under section 115 of Act V. of 1908 to revise the orders of the District Court of North Malabar in O. P. No 435 of 1912 and I. P. No. 437 of 1912 and O. P. No. 435 of 1912 respectively.

C. Madhavan Nair for petitioners.

C. V. Anantakrishna Aiyar for respondent.

The Court delivered the following

Judgment :—One Aramullan who was the Karnavan of his tarwad died on the 18th July 1912. He is alleged to have died in the house of his wife and children.

On the 27th July, Moideen who became the Karnavan of the tarwad on the death of Aramullan applied to the District Judge under Act XIX of 1841 for the appointment of a commissioner to take an inventory of the properties which were in the possession of the late Aramullan and for the delivery of the same to him.

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*C. R. P. Nos. 520 and 521 of 1912. C. M. P. No. 1491 of 1911.
11th October 1912.

Puthia Purajil Abdulla v. Puthia Purajil Mirthur.

On the same day without any inquiry the Judge appointed a Commissioner to take an inventory.

A Commissioner was accordingly appointed; upon this Abdulla with two others objected to the order. The Judge confirmed the first order. The first ground of objection was that there is no question of succession at all and therefore the Act does not apply. With reference to this objection the judge holds that it has not been finally settled that the tarwad takes by survivorship from a deceased Karnavan. I do not think there ever was any doubt on this point. The present Karnavan, the petitioner Moideen does not admit that the properties were the separate or self-acquired properties of the deceased Karnavan. His case as I understand it, is that they were tarwad properties in the possession of the deceased. He does not set up the right of the tarwad to take them by succession. The interest of the deceased therefore lapsed by survivorship to the tarwad.

Assuming however that is not the petitioner's, Mohideen's, case, it was the separate property of the deceased. I think it must now be taken to be finally settled by the Full Bench decision that Mr. Justice Holloway correctly laid down the law when he decided that self-acquisitions lapse to the tarwad and they do not descend to his own heirs who would take if he was not a member of any tarwad. I am therefore of opinion that the Act does not apply.

It is also contended that the Judge was wrong in issuing any order without holding any inquiry. It has now been settled by a series of decisions that the Judge must be satisfied that there are strong reasons for believing that the party in possession has no lawful title before issuing any notice. *Abdul Rahiman* v. *Kutti Ahmed*[1] *Papamma* v. *The Collector of Godaveri*[2] *Krishna Sami Panikonder* v. *Muthukrishna Panikondar*[3]. This is not denied by Mr. Anantakrishna Aiyar but he contends that under the proviso to S. 4 the Judge may even without any inquiry direct an inventory to be taken and he is not precluded from doing so by the decisions above cited.

I cannot accept this contention. Section (3) is imperative that the judge "shall in the first place inquire," whether there are strong reasons for believing that the party in possession has no title. Then S. 4 prescribes the issue of a notice after the judge is satisfied of the existence of "such strong ground of belief." The proviso

1. (1886) I. L. R. 10. M. 68. 2. (1889) I. L. R. 12. M. 341.
3. (1901) I. L. R. 24. M. 364.

Puthia Purajil Abdulla v. Puthia Purajil Mirthur.

that is relied upon by Mr. Anantakrishna Aiyar is a proviso to this section and not to section 3 which requires the judge to commence the inquiry therein referred to at once. In the course of that inquiry if it is necessary for citing the party complained against the judge may direct the inventory to be taken though he may not have concluded the inquiry. In this case the order was not issued in the course of the inquiry which the judge should have commenced on receiving the petition.

It is also contended that the deceased Anumallan left the property to the petitioners before this court and that the judge was therefore wrong in passing his second order confirming the first order. The judge as I understand him disagrees with the opinion of the learned judges in *Papamma* v. *The Collector of Godaveri*[1], that he is bound to give effect to any lawful directions that may have been given by the deceased. He is of opinion that those directions must be legal and as apparently he acts on the assumption that the properties belong to the tarwad and cannot be disposed of by will he holds the directions are not legal. The Act presupposes case of succession and if there are directions as to the disposal of the property the judge should give effect to them in this summary proceeding without considering their validity. Mr. Anantakrishna Aiyar however urges on the strength of the case above cited that this is a matter to be gone into at the final inquiry and not at this stage. But the section seems to imply that when the person complained against offers to prove that there are directions given by the deceased he should inquire into such allegation before any further order. I do not however rest my order on this ground.

I reverse the orders of the Lower Courts and dismiss the applications with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Khaji Sayyad Hussain Sahib ... *Appellant.**

v

Edige Narasimhappa and others ... *Respondents.*

Tort—Right of way—Obstruction—Special damage.

Per Curiam. Obstruction of a way without any special damage can afford no cause of action to a member of the public.

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*S. A. No. 1416 of 1911. 7th October, 1912.

1. (1889) I. L. R. 12 M. 346.

ussain Sahib v. arasim-nappa.

Per *Sundara Aiyar J* :—Special damage need not always be only pecuniary.

Per *Sadasiva Aiyar J* :—Special damage should be something substantial and not mere pecuniary damage to the extent of four annas or eight annas.

Second appeal from the decree of the Court of the Subordinate Judge of Bellary in A. S. No. 183 of 1909 preferred against the decree of the Court of the District Munsif of Penukonda in O. S. No 531 of 08.

S. Swaminathan for appellant.

K. Narayana Row for respondents.

The Court delivered the following:—

Judgment:—*Sundara Aiyar* J :—The suit which gave rise to the second appeal was instituted for an injunction against the defendants directing them to remove a bund which, according to the plaintiff, obstructed a public cart-track and for annas eight as damages. The defendants denied that there was a public right of way for carts at the place in question and also denied that the plaintiff sustained any special damage. The District Munsiff passed a decree in plaintiff's favour stating that the plaintiff had a right of easement to pass along the way and that the defendants obstructed the plaintiff in the exercise of that right. The Subordinate Judge on appeal has found that there was a public cart-track at the place when the bund was put up by the defendants but he dismissed the suit on the ground that the plaintiff did not allege or prove any special damage.

In second appeal it is contended by the learned Counsel for the appellant that the plaintiff was put to special inconvenience by the obstruction because it was necessary for him to pass along the way in order to reach a certain field of his to which the way led. Beyond this nothing has been alleged by the plaintiff. Paragraph 8 of his plaint is the only one that contains any allegation of damage. It states that the plaintiff wanted to take his cart along the way that the cart was obstructed by the bund and that therefore he sustained loss. At the hearing he attempted to prove that the cart contained stones which were required for his field and that owing to the obstruction of the way the stones were thrown down and the cart returned. It is not contended that the plaintiff would be entitled to claim the price of the stones which were thrown away nor as pointed out by the Subordinate Judge, has the plaintiff made any such claim. It is not disputed by Mr. Narayana Row, the learned Vakil, for the respondents that if the plaintiff alleged and proved that he sustained any special damage the suit would not be maintainable.

Hussain Sahib v. Narasimhappa.

Sundara Aiyar J.

The question is, is the fact the plaintiff sustained inconvenience in going to his field sufficient to entitle him to maintain the suit? *i. e.*, could it be regarded as special damage sufficient to entitle him to any relief for the obstruction of a public right of way? We are of opinion that on the authorities we are bound to hold that this is not sufficient. The English rule that an action for the obstruction of a public highway is not maintainable unless special damage is alleged and proved, has been so long accepted in this country that it is impossible to question it now. Moreover the legislature has now accepted the same view as shewn by S. 91 of the Civil Procedure Code. The following observations occur in Clerk and Lindsell on Torts, 4th Edn. pp. 395 & 396 :—But mere personal inconvenience caused by the plaintiff being delayed by an obstruction in the high road without pecuniary damage, will not suffice nor is it enough that the plaintiff has been put to expenses in exercising his right of abating the obstruction and it is immaterial that the degree of personal inconvenience suffered may be in excess of that suffered by the rest of the public, for the Court cannot enter into the consideration of the *quantum*............In *Herbert* v. *Groves*[1] where by reason of an obstruction the plaintiff was compelled to carry his goods by a circuitous route, but no proof of any pecuniary loss, resulting therefrom was given, the plaintiff was non-suited. And in *Chaplain* v. *West Minister Corporation*[2] it was held that the erection of an electric standard in a public thorough fare, opposite to the plaintiff's premises, whereby the transit of merchandise, from vans to warehouse across the public pathway, was impeded, afforded no ground for action." See also *Mayo* v. *Seaton Urban District Council*[3].

It seems to me to be clear that the mere fact that a person has to use a way more often than another and is therefore put to more inconvenience will not entitle him to maintain an action for obstruction of the way. The learned Counsel for the appellant is probably right in his contention that actual pecuniary damage is not necessary in all cases to justify an action. He refers to *Abzul Miah* v. *Nazir Mahammad*[4] in support of his argument. There in consequence of the obstruction of a public way the plaintiff was deprived of the only access to a grazing ground. The damage caused by such deprivation is certainly tantamount to pecuniary damage. The observation of *Muthuswami Aiyar* J. in *Siddeswara* v. *Krishna*[5] carries the case no further. In *Greasly* v. *Codling*[6] which was also relied on by Mr. Swaminadhan, the plaintiff was a

1. (1794) 1 Essp. 148.
2. (1901) L. R. 2 Ch. 339.
3. (1904) L. R. 68 J. P. 7.
4. (1895) I. L. R. 22. C. 551.
5. (1903) I. L. R. 14 M. 177.
6. 2. Bing. 263.

Hussain Sahib v. Narasimhappa.

Sundara Aiyar J.

seller of coal and suffered damage by the obstruction because it prevented him from making as many trips as he otherwise could and therefore reduced his income. We doubt whether *Mohart Ram Chowdhri* v. *Joti Prasad*[1] is consistent with the law as laid down in the English and Indian Cases. We must hold that the plaintiff has not alleged or proved anything which can be regarded as special damage. In the absence of sufficient allegations in the plaint it would be useless to allow the plaintiff to adduce any fresh evidence.

We dismiss the second appeal with costs.

Sadasiva Aiyar J.—I wish to add that the special damage which the plaintiff alleges in such cases should be of a substantial character. Mere pecuniary damage to the extent of 4 annas or 8 annas or a similar unsubstantial sum or an inconvenience which is temporary and not substantial should not be allowed to retract from the operation of the general rule. If it is so allowed it would be very easy for every plaintiff with the help of an acute legal adviser to always allege and prove such unsubstantial special injury. The case in *Abzul Miah* v. *Nazir Mahommed*[2] seems to have gone as far as the exception can be legitimately pushed in such cases.

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1. (1912) 8 A. L. J. 19. 2. (1895) I. L. R. 22. C. 551.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

Present:—Mr. Justice Wallis, Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Bommidi Bayyan Naidu. ... *Appellant* (*Plaintiff.*)*

v.

Bommidi Suryanarayana, minor by guardian Bommidi Ammanna. ... *Respondent* (*2nd Defendant*)

Bayyan Naidu *v.* Suryanarayana.

C. P. C. S. 11 Exp. IV—"Directly and substantially in issue"—"Heard and decided"—"In issue"—Propriety of patta, issue on, how far directly and substantially in issue in rent suit.—Subsequent suit for rent of subsequent fasli—Extent of holding—Question of.

Plaintiff brought a suit for rent due for fasli 1316. Defendant raised the plea that the patta tendered was not a proper patta and that the extent of defendant's jeroyati land had been very much overstated in it than was really the case. The plaintiff had previously brought a suit for rent for faslies 1314 and 1315 and had obtained a decree. The patta then tendered was similar to the one tendered for the suit fasli and the issue in the previous suit was:—"Whether plaintiff tendered pattas to the first defendant and whether the pattas so tendered were proper." The decision then was that there was tender and that there was nothing objectionable in the patta.

Held Per *Curiam* concurring with *Munro* J. and dissenting from *Sankaran Nair* J:—that the plea of the defendants was barred by *res judicata* by reason of the decision of the issue in the prior suit for faslies 1314 and 1315.

The decision as to the extent of the holding was directly and substantially in issue in the prior suit.

2. The decree for rent in the prior suit involved the decision that proper patta had been tendered.

3. Even otherwise, the question must be deemed to have been directly and substantially in issue by virtue of Expl. IV to S. 11 C. P. C.

Per *Sundara Aiyar* J:—In order to constitute *res judicata* it is not necessary that there should be an *express* decision.

2. The test is whether the matter was essential for the decision in the former suit and not whether it was essential for the relief granted.

The rule of an essentially implied decision being *res judicata* is not confined to the decision of the suit, but also applies to the decision of an issue in the suit; and the language of Expl. IV is equally applicable to both.

Per *Sadasiva Aiyar* J. *Obiter.*—Where the subject matter of the former litigation and the relief claimed therein were the same as those claimed in the subsequent litigation, courts should try their best to hold that the causes of action in such cases are substantially the same. *Arunachellam Chetty* v. *Meyappa Chetty*[1] approved. *Ramasawmi Iyer* v. *Vythianatha Iyer*[2] dissented from. *Thrikaikal Madathal Ranah* v. *Thrikaikal Krishnan Nair*[3] commented on.

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* L. P. A. No. 32 of 1911. 9th September 1912.

1. (1898) I. L. R. 21 M. 91.
2. (1903) I. L. R. 26 M. 760.
3. (1905) I. L. R. 29 M. 153.

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Bayyan Naidu v. Suryanarayana.

Observation by *Sundara Aiyar* and *Sadasiva Aiyar* JJ. as to when a defence will be *res judicata.*

Appeal under section 15 of Letters Patent against the decree of Munro and Sankaran Nair, JJ., in Second Appeal No. 640 of 1909*, presented against the decree of the District Court of Ganjam in Appeal Suit No 170 of 1908 (Original Suit No. 861 of 1907 on the file of the Court of the District Munsif of Sompeta.

The facts and arguments advanced in this case on both sides are fully given in *Bammidi Bayyan Naidu* v. *Bummidi Paradesi Nayudu*[1], and owing to a difference in opinion among the Judges who decided the same the above L. P. Appeal was filed.

T. V. Seshagiri Aiyar for appellant.

S. Swaminadhan for respondent.

T. V. Seshagiri Aiyar cited in addition to the cases quoted in the above judgment, the following cases before the Full Bench *Surjiram Marwari* v. *Bashamdeo Persad,*[2] *Kailash Chunder Mandal* v. *Ram Naranigiri*[3], *Mohin Chander Saikar* v. *Amil Bhandu Adhikary*[4], *Humphreys* v. *Humphreys*[5], *Cooke* v. *Rickman*[6], *Howlett* v. *Tarte*[7], *Raja Kumara* v. *Thatha Ramaswami Chetty*[8], *Panchu Mandal* v. *Chandra Kanta Saha*[9], *Appan Sadagopa Iyengar* v. *Prayag Dasgiruva.*[10]

S. Swaminadhan quoted *Vythilinga Mudaliar* v. *Ramachandra Naiker.*[11] [*Sundara Aiyar* J. The issue there was 'what was the extent of the land the defendant was in possession.]

The Court delivered the following

Judgments. *Wallis* J:—I agree with Munro J. that the extent of the defendant's holding under the plaintiff is *res judicata* by reason of the decision in O. S. No. 430 of 1906. In that case the present plaintiff, who held a five years' lease of the village from the registered landholder, sued the present defendant to recover rent for faslies 1314 and 1315 in the shape of Rajabagam, or landholder's share of the produce, of certain jeroyati lands in the village in the occupation of the defendant. To enable the plaintiff to succeed it was necessary for him to show under section 7 of the Rent Recovery

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* (1911) 21 M. L. J. 344.

1. (1911) I. L. R. 35 M. 216.
2. (1905) 1 C. L. J. 349.
3. (1906) 4. C. L. J. 211. 15.
4. (1909) 13. C. W. N. 513
5. (1910) 2. K. B. 531.
6. (1911) 2. K. B. 1125.
7. (1861) 10 C. B. N. S. 813.
8. (1911) I. L R. 35 M. 75.
9. (1909) 14 C. L J. 220.
10. (1911) 21 M. L. J. 730.
11. (1904) 14 M. L. J. 373.

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Wallis J.

Act 1865 that he had tendered a proper patta to the defendant for each fasli, or that it had been agreed to dispense with the tender. Under section 4 the patta had to contain the local description and extent of the land. The plaintiff pleaded that he had tendered a proper pattah for each fasli. The defendant denied the tenders, and pleaded further that the pattas alleged to have been tendered were not proper instancing certain payments claimed. He pleaded further that "the extent of the defendant's jeroyati land (that is, of the land in respect of which the plaintiff claimed rent) has been very much overrated." I think that must be taken as referring to the extent in the patta as well as to the extent in the plaint, which would merely reproduce it; and I think the District Munsif who tried the case so understood it, as in his careful summary of the written statement he makes no express mention of the plea as to the extent of the land and evidently treats it as part of the plea that the pattas tendered were improper; and I think it was also covered by the issue "whether the pattas so tendered are proper" and by the terms of the judgment on that issue, which is as follows; "The terms of the pattas Exhibit F do not contain any objectionable matter." If this view of the pleadings is correct, there is an end of the case, because the question of the extent of the defendant's jeroyati holding was directly and substantially in issue in the previous suit and must be taken to have been heard and finally decided in the plaintiff's favour, as such a decision is necessarily involved in the decree passed in the plaintiff's favour, seeing that, if the decision had been the other way, it would under the Rent Recovery Act, have been fatal to his suit which must have been dismissed on the ground that the patta was not a proper one.

In his judgment Sankaran Nair J. observes that a decree for rent does not necessarily involve the decision that a proper pattah has been tendered, as the parties may dispense with them; but where as here tender of a proper patta is alleged on the one side and denied on the other and there is no suggestion that tender has been dispensed with, it seems to me that the decree for rent does involve the decision that a proper patta has been tendered.

Apart from any question as to the terms of the patta, it seems to me that the extent of the defendant's holding of jeroyati land in the village was a matter directly and substantially in issue in the suit, as it was in respect of this extent that plaintiff was claiming Rajabagam, or landholder's share of the produce, from the defendant; and that it was necessary for him to prove this extent to enable a decree to be given in his favour, even if there had been no plea in

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the written statement, as there was, that the extent had been overestimated. In these circumstances I think the decision on the 6th issue that the plaintiff was entitled to the Rajabagam claimed in the plaint necessarily involved a decision that the extent of the defendant's jeroyati land in the village was as alleged in the plaint, because what he claimed was the Rajabagam of this extent, and that this point must be taken to have been decided in the plaintiff's favour.

In either view the question of the extent of the defendant's holding of jeroyati land in the village having been directly and substantially in issue and having been, as we must take it, heard and determined because essential to the decision of the suit, cannot be raised again in the present suit for the rent of fasli 1316 by the defendant's setting up that he was all along in occupation of only 5 acres of jeroyati land in the village and not of the extent all along claimed by the plaintiff.

But even assuming that the propriety of the pattah was not questioned in the former suit on the ground that the extent of the lands was wrongly shown and that the extent was not otherwise questioned by the defendant, I think that these being good grounds of defence to the suit might and ought to have been raised, and must be deemed to have been matters expressly and substantially in issue in the former suit by virtue of Explanation IV to section 11 of the Civil Procedure Code. It seems to me that any ground of attack or defence which by virtue of the explanation is deemed to have been directly and substantially in issue in a suit must also be deemed to have been heard and finally decided adversely to the party who failed to raise it. The proposition that failure to raise grounds of attack or defences which might and ought to have been raised does not make such ground *res judicata* unless there is an express decision by the Court upon them appears to me to be wholly untenable. Courts of justice are not in the habit of deciding points not raised before them; and to say that the Explanation only takes effect when they happen to do so appears to me to defeat the policy of the section and to render the Explanation senseless as; held by the Allahabad High Court in *Sri Gopal* v. *Pirthi Singh*[1], a decision confirmed on appeal in *Sri Gopal* v. *Pirthi Singh*[2], by their Lordships of the Judicial Committee who thought it sufficient to say that the judgment of the High Court was clearly right and that the appeal on this point was unarguable. I do not therefore consider it necessary to refer to the earlier decisions of the Calcutta High Court on which *Sankaran Nair* J. relied, and it is the more unnecessary to do so as they are

1. (1898) I. L. R 20 A. 110. 2. (1902) I. L. R 24 A. 429.

very fully examined in the judgment of Sundara Aiyar J. The appeal must be allowed, the decrees of this court and the lower appellate court reversed, and the case remanded to the District Judge for disposal according to law. Costs will abide the event.

Sundara Aiyar, J.—This is an appeal under section 15 of the Letters Patent arising out of Second Appeal No. 640 of 1909. The original suit which led to the Second Appeal was instituted by a landlord for the recovery of rent from the defendants, his ryots, for the fasli year 1316. According to the plaintiff's case the defendants were in possession of about 14 acres of jeroyati lands under him liable to pay waram or rent in kind. The 1st defendant, the undivided father of the 2nd defendant, contended that he held only 5 acres of jeroyati lands and that he held in addition 10 acres of Inam and 3 acres of cash-rent-paying lands and denied that any patta was tendered to him for the fasli in question as alleged by the plaintiff. The correctness of the patta alleged to have been tendered was also denied. The 7th issue framed by the Munsif raised the question "whether the alleged tendered patta was valid and binding on the defendant." The 8th issue was "whether the whole of the 14 acres of land mentioned in the plaint is defendants' jeroyati as alleged by the plaintiff, or only 5 acres jeroyati and the rest Inam and cash-rent-paying land as alleged by the defendants." At the hearing a further question was raised whether the question of the propriety of the patta tendered was *res judicata* in consequence of the dicision of the Court in O. S. No. 430 of 1906 related to a suit for rent instituted by the plaintiff against the defendants for fasli 1314. The District Munsif held that the matter was not *res judicata* because the points in dispute were not raised in the previous suit, these points being the inclusion of Inams and of money-rent-paying lands as waram paying lands, and the erroneous description of the lands for which the plaintiff is entitled to claim rent. On the merits he held that the patta tendered was not a proper one. He was of opinion that part of the lands included in the patta was Inam and was wrongly claimed by the plaintiff as jeroyati. He did not decide the question whether cash rent and not rent in kind was payable for part of the land. He apparently thought that the patta must be held to be incorrect in stating that waram was payable while cash rent was received till the end of Falsi 1313. The mistake complained of with regard to the description of the land was that the eastern boundary was described as the service Inam of the defendant, while in the patta for Faslis 1313, 1314, it was described merely as defendants' Inam. This was held by the Munsif to be improper although he did not decide the question whether the description of the

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boundary of the defendants' land as service Inam was in fact correct or not. He dismissed the plaintiff's suit. His judgment was confirmed on appeal by the District Judge who upheld the Munsiff's view on the question of *res judicata*. The Judge observed on the question of the correctness of the patta as follows:—"Appellant does not seriously argue that the patta was a proper one." The plaintiff preferred a Second Appeal to this Court. The question argued in Second Appeal was that the propriety of the patta was *res judicata* by the judgment in O. S. No. 430 of 1906. The Appeal came on for hearing before *Munro* and *Sankaran Nair*, JJ. The learned Judges differed in their views, *Munro*, J. being of opinion that the plea of *res judicata* must be upheld, while *Sankaran Nair*, J. agreed with the opinion of the lower Courts that it should not be maintained. In the result, the Second Appeal was dismissed in accordance with the provisions of section 98 (2) of the Civil Procedure Code. The present appeal is therefore substantially against the Judgment of *Sankaran Nair*, J. In the previous suit, O. S. No. 430 of 1906, the 1st issue was "whether the plaintiff tendered pattas to the 1st defendant for Faslis 1314 and 1315 and whether the pattas tendered are proper." The tender of patta was held to be proved. The finding on the question of its propriety was in these terms:—" The terms of the pattas, Exhibits E and F, do not contain any objectionable matter. I accordingly find the 1st issue in the affirmative." In the written statement in that suit, marked as Exhibit C, in the present suit, paragraphs 8 and 9 took objections to the correctness of the patta. Paragraph 8 stated:—" The pattas alleged to have been tendered are not proper. The terms in paragraph 3 of the plaint are not mamool terms." The terms referred to related apparently to the giving of firewood, the payment of interest and the amount of road cess payable by the ryot. Paragraph 9 stated: " The extent of defendants' jeroyati land has been very much over estimated by the plaintiff." So far as the written statement was concerned the details of the overstatement of the extent of the jeroyati land were not stated and no specific objection was taken to the statement that some portion of the lands was wrongly mentioned as liable to pay waram instead of cash rent. The objection in the present suit with regard to the description of the eastern boundary may be left out of account as it cannot be held to affect the plaintiff's right to the land in question. It is immaterial whether the defendants' land which forms the eastern boundary was his service Inam or an Inam of a different character so far as the relations between the plaintiff and the defendants with regard to the plaint land are concerned. The District Munsif did not find that the description of it as service Inam

was incorrect. It does not appear to what points the evidence let in by the parties in the previous suit related with respect to the correctness of the patta, and the Munsif's finding throws no further light as it is expressed in general words "the terms do not contain any objectionable matter." The appellant's contention is that the defendants who set up that a proper patta had not been tendered were bound to raise all objections that they could to the propriety of the patta and that the judgment in the previous suit must be taken to be an adjudication that the terms of the patta were correct in every respect and that therefore they cannot raise any objection to the propriety of the patta in this suit which they might have failed to urge in the previous suit. Except in the matter of the difference in the description of the eastern boundary which, in my opinion, may be neglected it is not stated that the terms of the patta tendered for Fasli 1316 were not similar to the patta for Fasli 1314 which was held to be a proper one in the previous suit. The District Munsif observes that the patta in question was virtually the same as that which was tendered for Fasli 1314. The correctness of this statement is not seriously disputed. *Munro*, J. observes:—"Had the issue in the previous suit relating to the correctness of the patta been found in the negative, the plaintiff's suit must have been dismissed. The finding in the previous suit that the pattas were proper *i. e.*, that they were such as the defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the land entered in the pattas and I do not think that the defendants can again be allowed to put the plaintiff to proof of his title." *Sankaran Nair*, J. held having regard to the general language of the District Munsif's finding in the previous suit that there was no explicit adjudication there of the questions now raised, *viz.*, whether a portion of the lands was Inam or Jeroyati and whether another portion was liable to pay cash rent or waram. The learned Judge was further of opinion that as the suit related only to the rent for a particular year [F. 1316] it did not necessarily require a decision as to the terms of the patta or the extent of the land for which rent was payable, and that these questions are therefore not *res judicata.*

The decision of the question depends on the interpretation to be placed on section 11 of the Civil Procedure Code which embodies the rule of *res judicata.* According to the section, the Court is forbidden to try "any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties." The rule applies subject to

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the other provisions of the section not only to a suit tried before but to an issue decided in a previous suit provided the matter directly and substantially in issue in the later suit was raised in the previous suit or in a substantial and direct issue in the previous suit. Explanation III lays down—" The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other." An implied denial is as effective as an express one. Explanation IV says " Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

The appellant contends that with respect to any issue in the former suit the parties were bound to put forward all grounds of attack or defence material for the decision of the issue and will be deemed to have done so even if they failed to do so in fact; that the propriety of the patta was directly and substantially in issue in the previous suit, and that both the plaintiff and the defendants were bound to put forward every matter involved in the question of the correctness of the patta and that the decision that the patta was a proper one must be taken to be a decision that there was no valid objection of any sort to it; and that the defendants cannot now be permitted to raise any matter relating to the propriety of the patta which he might have failed to raise before. I am of opinion that these contentions must be upheld. The learned counsel for the respondent rested himself on the arguments contained in the Judgment of *Sankaran Nair*, J. and did not elucidate the points any further. It becomes therefore necessary to examine the arguments contained in the Judgment of that learned Judge. He lays down the following propositions as I understand his Judgment :—

(1) The scope of the rule of *res judicata* as limited by the words 'directly and substantially in issue' is not confined to the relief granted by the former suit or to the property which was the subject matter therein.

(2) The decision on a matter not essential for the relief finally granted in the former case, or which did not form one of the grounds for the decision itself, cannot be said to have been directly and substantially in issue; but, where the decision on a question was essential to the relief granted or the decree passed, or where it formed the groundwork of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit.

The difference between issues 'collateral' and 'direct' depends upon whether it was possible to pass the decree without any finding upon the particular issue.

(3) With regard to the relief granted in a suit, the decree may render it necessary to imply a decision on a question not expressly decided, but with regard to issues no implication is necessary but we ought to have a clear decision to create a bar. The application of the latter part of the rule would of course be to cases where the subject matter of the two suits is different.

(4) Explanation (IV) does not dispense with the necessity of a finding upon a matter which might and ought to have been made a ground of defence or attack in the former suit unless that matter must be taken to have been involved in the actual decree passed in the case.

(5) It is not enough to make the matter of an issue *res judicata* that the decision of it in a different manner would be inconsistent with the decree in the previous case as such determination would not affect the actual decree passed in that case for the rent for fasli 1314.

(6) A decree for rent does not necessarily involve the decision that a proper patta has been tendered.

If therefore as a fact that question was not decided in the previous suit, we are not bound to imply that it was so decided.

Now Section 11 of the Civil Procedure Code requires that the matter or issue should have been heard and finally decided by such Court. It does not say that it should have been decided in explicit terms. It cannot be doubted that if an adjudication on a matter is necessarily involved in the decision in a prior suit, the section must be understood to lay down that it must be taken to have been heard and finally decided. *Sankaran Nair*, J. admits that the principle of an implied decision must be adopted so far as whatever is required by decree in the previous suit is concerned. But he lays down that it is not applicable with regard to issues. He does not say how then the judgment in a suit is to be understood. No such distinction is warranted by the language of the section. The suit and an issue put forward for trial in the second suit are treated on exactly the same footing in the section, and the test of *res judicata* with regard to each is whether the matter directly and substantially in issue in the later suit was the matter directly and substantially in issue in the suit or in an issue in the earlier suit. The word "issue" in the expression "suit or issue" must be distinguished from the use of the

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words ' in issue' in the expression " the matter directly and substantially in issue." The latter expression as already stated is made applicable to both the later suit and an issue raised in it. " Directly and substantially in issue" obviously means " directly and substantially in question, which would include everything necessarily involved" whether that expression is applied to the suit itself or an issue in it. This has to be borne in mind in interpreting explanation IV also. It speaks of " any matter which might and ought to have been made ground of defence or attack in the former suit." The phrase " matter directly and substantially in issue" in the principal clause of the section is spoken of with reference to both suit and issue. Clearly therefore what ought to have been made ground of defence or attack with respect to any issue in the earlier suit must be taken to have been a matter directly and substantially in issue therein when the question is whether an issue in the earlier suit can be tried again in the later suit. Again in deciding whether any matter is *res judicata*, the question is, what is necessarily involved in the actual Judgment of the Court in the earlier suit, not what relief was granted by the decree, because it is the matter decided (expressly or by necessary implication) that becomes *res judicata*. It is desirable to illustrate by a concrete example. Suppose a suit is instituted for one of the instalments payable according to the terms of a bond. The defendant denies its genuineness and pleads also absence of consideration, and issues are framed on both points. The Court passes a decree for the instalment but records no explicit finding on either of the issues. A suit is subsequently instituted in the same Court for a second instalment and the defendant raises the same pleas as in the earlier suit. The subject matter of the two suits is not the same and the dismissal of the second suit would not affect the actual decree passed in the earlier suit. Can it be contended that the issues may be tried again in the second suit? According to the learned Judge apparently they should be tried again. The executant of the bond, according to him, though he cannot seek to recover back the amount decreed against him in the earlier suit, may resist the second suit for the later instalment. The difference between issues ' collateral' and ' direct,' according to the learned Judge, depends upon " whether it was possible to pass the decree without any finding upon the particular issue." I am unable to accept his position that though a finding might be necessary to pass the judgment in the previous suit, the issue should not be taken to have been decided (unless explicitly decided) if the result of the second suit would not be to reopen the actual decree in the previous suit. The result of such a position would be that the same issues may

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be re-opened again and again in the same court though such re-opening would be inconsistent with the decree and judgment in every one of the previous suits. According to the learned Judge such inconsistency is immaterial. The decision of the Privy Council in *Amanat Bibi* v. *Imdad Husain*[1] is referred to in support of this position. There were two earlier proceedings, one, a suit to establish a sub-properietory right as against a talukdar, the other, a proceeding to recover the same property from the talukdar under the terms of a certain revenue circular on repaying to the talukdar the arrears of revenue which he had paid to the government. The third proceeding in which the plea of *res judicata* was raised was a suit to redeem a mortgage granted by the person who was plaintiff in the earlier proceeding. The Privy Council held that the third suit was not barred as *res judicata* because the cause of action was different. Their Lordships held that the cause of action to establish a sub-proprietory right was obviously different from that in a suit for redemption though the property sought to be recovered was the same. The question in issue, said their Lordships, was quite different in the two suits; and they interpreted the provisions in section 7 of Act VIII of 1859 which enacted that "every suit shall include the whole of the claim arising out of the cause of action" as not requiring that "every suit shall include every cause of action or every claim which the party has, but only that every suit should include the whole of the claim arising out of the action on which the suit is brought." It is now a well-established proposition that, though the subject-matter of the litigation and the relief claimed may be the same, different suits may be maintained by a plaintiff if the cause of action in each suit be different. There were two stages in the second of the earlier proceedings. The first originated in an application by the plaintiff under a Revenue circular to recover the property. The Settlement Officer who made the inquiry found that the plaintiff had conveyed the property to the talukdar by a conditional sale which had become absolute in 1853 and that the plaintiff was further not entitled to recover the property as he had not repaid to the talukdar certain arrears of revenue paid by the latter which he was bound to repay before claiming to recover the property. Their Lordships held that this order under the special circular could not be treated as judicial proceedings at all. The plaintiff then had recourse to fresh proceedings on the ground that the payment of arrears by the talukdar must be treated as having been made on his account. The Settlement Officer then again decided that the property had been transferred to the talukdar by a conditional sale of the year 1853

1. (1888) L. R. 15 I. A. 106.

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which had become absolute. Their Lordships held that the question in those fresh proceedings must be taken to have been merely "whether the plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar on repaying to the talukdar the arrears of revenue which he had paid to Government," that being according to their Lordships the cause of action on which the plaintiff then claimed to recover. The matter in issue in the suit before their Lordships, they said, was "the respondent's right to redemption under the mortgage-deed of 1854." Their Lordships then observed, "It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under purchase from the mortgagor. But if it be established that the respondent was a mortgagor in 1854 with the right of redemption, why should he be barred merely because at an earlier date he may have had no right to the property at all?" This is the passage relied on by the learned Judge for the proposition that the decision of an issue in the earlier suit inconsistent with an issue in the later suit will not make the suit or issue in the later suit *res judicata.* I can find no such proposition laid down by the Privy Council. They did not regard the later suit as inconsistent with the decision in the former suit that there was a conditional mortgage of 1853 which, if it was in operation, had become absolute in 1853. Proceeding on the basis that the conditional mortgage had been established to be true, if the talukdar chose to take a mortgage in 1854 from the plaintiff and his subsequent holding was under that mortgage, their Lordships held that the mortgage of 1854 would furnish the plaintiff with a fresh cause of action, and a plaintiff need not combine in the same suit all his causes of action, though both suits might be for the recovery of the same property. They did not say that in the later suit the execution of the conditional sale of 1853 or its having become absolute could be denied. The observation that it may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor meant no more than that it might appear to be improbable that a person who was absolute owner in 1853 would take a mortgage in 1854; but a mortgagee cannot deny the title of his mortgagor, and if the talukdar chose to take a mortgage from the plaintiff in 1854 he could not say that the plaintiff did not obtain a fresh cause of action for redemption of that mortgage. On the other hand, in *Pahalwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur*[1], the Privy Council applied the rule of an implied decision of an issue by a former adjudication

1. (1872) 12 B. L. R. 391. (P. C.)

although the property in the two suits was different. The learned Judge seems to have been under the impression that in that case the decree in the later suit would re-open the decree in the earlier suit, but that was not the case, as the property in dispute in the two suits was different. It is of course necessary that in order that an issue may be *res judicata* the decision in the former suit must necessarily involve an adjudication in a particular way on the issue raised in the later suit and its adjudication in a contrary way in the later suit must be inconsistent with the adjudication which must be implied in the earlier suit. In one part of his judgment the learned Judge observes that where the decision on a question was essential to the relief granted, or where it formed the ground-work of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit, but he afterwards restricts the scope of the second test to cases where the question was explicitly decided. For this restriction I can find no warrant either in principle or in the language of the section.

The statement that a decision on a matter not essential for the relief finally granted cannot be said to have been directly and substantially in issue is unworkable in practice, where a suit is dismissed without any relief being granted. The test should really be whether the matter was essential for the decision in the earlier suit, not for the relief granted. The decision of a court proceeds on the matters put in contest by the parties and its adjudication cannot be understood without regard to the actual contest. It is impossible to understand it merely with regard to the decree. Suppose a suit for an instalment on a bond is dismissed, the defendant's plea being that the bond is not genuine and that it is not supported by any consideraion. The court does not record any explicit findings on these points, either of which would lead to the dismissal of the suit. Suppose the plaintiff afterwards institutes a suit for another instalment and the defendant raises the same pleas. Can the plaintiff be permitted to say that the points should be tried again and he should be given a decree if both points are found in his favour ? *Sankaran Nair*, J. concedes that the granting of the relief may be taken to involve the decision of whatever point is necessary to support the decree. But what points are to be taken as involved in the decree in the instance just put ? How is it possible to decide a question of *res judicata* by a consideration of the relief alone which is granted and without a consideration of the judgment in the case, and how is it possible to understand what the Court decides in the judgment without seeing what the contest between the parties was? The result of doing so would be to confine the doctrine of *res judicata*

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to the scope of the rule *transit in rem judicatum* (except where a matter directly and substantially in issue has been explicitly decided by the judgment in a former suit). Suppose in the illustration already put of a defendant denying both the genuineness and consideration of an instalment bond, the defendant in the second case admits the genuineness of the bond but denies only the passing of consideration for it. If it is open to the Court in the later suit to proceed on the footing of the genuineness of the bond, the question would arise whether the matter as to consideration is *res judicata* by the former judgment. As no explicit findings on the points in contest were recorded in the judgment, the decision might have proceeded either on the ground that the bond was not genuine or that it was not supported by consideration, or on both grounds. It might be proper in such a case to hold that the previous judgment did not necessarily imply a decision on the question of consideration. Certainty is essential for the application of the rule of *res judicata* and the court would not prevent the reagitation of a matter where it is not certain that the previous decision proceeded on a particular ground. See *Vaithilinga Mudaliar* v. *Ramachendra Naicker*[1]. If a suit for an instalment is dismissed for default no matter would be *res judicata* in a claim for another instalment. If it is decreed *ex parte*, the genuineness of the bond and all questions as to its enforceability, so far as to justify a decree for the instalment would be *res judicata* in a suit for another instalment. The learned Judge apparently proceeds on the view that for some reason the scope of the rule of *res judicata* with regard to issues should be restricted as far as possible and refers to the opinion of *Stuart* C. J. in *Babu Lal* v. *Ishri Prasad Narain Singh*[2] and *Mahammad Ismail* v. *Chatter Singh*[3] who regretted the application in this country of the principle of *res judicata* to the trial of issues, and not merely to the subject-matter in previous suits. It is necessary to consider whether there are good grounds for such regret. The rule was well established by the decisions of the Priviy Council.—see *Krishna Behari Roy* v. *Brojeswari Chowdrunee*[4], *Pahalwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur*[5], *Soorjomonee Dayee* v. *Suddanund Mohapatter*[6], *Pittapur Raja* v. *Buchi Sitayya.*[7] Section 13 of Act X of 1877 and section 11 of the present code made the expression "matter directly and substantially in issue" applicable both to 'suit' and 'an issue in a suit.'

1. (1904) 14 M. L. J. 373.
2. (1880) I. L. R. 2 A. 582
3. (1881) I. L. R. 4 A. 69.
4. (1875) 2 I. A. 283.
5. (1872) 12 B. L. R. 391.
6. (1873) 12. B. L. R. 304.
7. (1885) I. L. R. 8 M. 219.

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The learned Judge holds that the proper terms of the patta to be tendered by the land-holder to the ryot could not be regarded as having necessarily been directly and substantially in issue in a suit for rent. Two decisions of the Privy Council are referred to in support of this position. The first of them is *Misir Raghobardial* v *Sheo Baksh Singh.*[1] In that case the plaintiff had previously instituted a suit for Rs. 1,665, the balance of interest due on a bond for Rs. 12,000 in a court not competent to try suits exceeding Rs. 5,000 in value. The defendant had pleaded that the bond was supported by consideration only to the extent of Rs. 4,790, and that the amount already paid by him for interest exceeded the interest due on the actual consideration that had passed. The defendant's plea was upheld. The plaintiff subsequently instituted a suit for the principal and interest due on the bond in a court competent to try a suit of that value. The question was whether decision in the previous suit as to the amount of consideration that had passed for the bond was *res judicata* in the subsequent suit. Their Lordships held that it was not. The point was decided on the ground that the court that decided the previous suit was incompetent to try the later suit for principal and interest. The rule as to the necessity for the court trying the previous suit having concurrent jurisdiction to try the later suit had also been laid down by the decisions of the Privy Council under Act VIII of 1859, although the language of section 2 of that Act did not in terms refer to that requisite. Sir Richard Couch in pointing out that the rule already applied by the Privy Council while Act VIII of 1859 was in force was embodied in explicit terms in Act X of 1877 went on to observe that the issue as to consideration "was a 'collateral' rather than a 'direct' issue in the suit." He said the "plaintiff might have succeeded without having a finding upon it if he had proved an admission by the defendant that the sum claimed was due for interest, or had shown that the Rs. 2,475, (the sum alleged to have been paid for interest) had been expressly paid on account of the larger sum which he said the defendant owed for interest." This is immediately followed by the sentence "If the decision of the Assistant Commissioner is conclusive, he will, although he could not have tried the question in a suit on the bond, have bound the plaintiff as effectually as if he had jnrisdiction to try that suit. Their Lordships think that this was not intended and that by court of competent jurisdiction, Act X of 1877 means a court which has jurisdiction over the matter in the suqsequent suit in which the decision is used as conclusive, or in other words, a court of concurrent jurisdiction." It is clear to my mind that his Lord-

1. (1883) I. L. R. 9 C. 439.

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ship in making the observation contained in the previous sentences was only dealing with the question of the necessity of concurrent jurisdiction in the court which tried the earlier suit, and he used the expression "collateral' in the sense of 'not referring to the subject matter of the previous suit' and that he did not mean that it was not necessary for the decision of the suit on the issues raised between the parties on the pleadings in the case. The observation was made with reference to the principle that the judgment of a court not having jurisdiction to try the later suit would not be *res judicata* on any issue in the earlier suit but only with respect to the actual subject matter of the previous suit. In *Run Bahadur Singh* v. *Lucho Koer*[1] the decision in *Misir Raghobardial* v. *Sheo Baksh Singh*[2] was treated as an authority only on the question that the adjudication of a Court not having concurrent jurisdiction with that trying the later suit would not make the decision of an issue *res judicata*. Both *Misir Raghobardial* v. *Sheo Baksh Singh*[2] and *Run Bahadur Singh* v. *Lucho Koer*[1] on the other hand proceed on the assumption that if there had been concurrence of jurisdiction in the two courts the finding on an issue in the earlier suit would have given rise to a successful plea of *res judicata*. It would appear that in the *Duchess of Kingston's* case which was referred to by Sir Richard Couch in the judgment in *Misir Raghobardial* v. *Sheo Baksh Singh*[3] the expression 'direct issue' as opposed to a 'collateral' one was used in the sense of an issue directly determining the subject matter of the previous proceedings and not in the sense in which it is obviously used in the Indian statute. There is in my opinion no foundation at all for making a distinction between an explicit decision and an implied decision of an issue in the application of the doctrine of *res judicata*, provided the matter raised in the issue was directly and substantially in issue in the earlier suit. If the decision was not sufficiently explicit that would no doubt furnish the party affected by it in the earlier suit a good ground for appeal against the decision just as any other error or imperfection would do, but the defect in the finding is not one that can be collaterally attacked in the later suit. The same observation would apply even if an issue regarding a matter directly and substantially in issue in the former suit was not clearly raised or not raised at all provided the matter is such that it must be taken to have been decided in the earlier suit, that is, provided the judgment would not be sustainable unless the matter be taken to have been decided. Mr. *Justice Sankaran Nair* holds that explanation IV which states that

1. (1885) I. L. R. 11 C. 301. 2. (1883) I. L. R. 9 C. 439.
3. (1883) I. L. R. 9 C. 439.

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'any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit' does not qualify the statement in the principal clause that the matter in issue should have been 'heard and finally decided by such court.' It is of course true that the matter should have been decided in contemplation of law but if, as the learned Judge concedes, it is sufficient if the matter must be taken to have been decided by necessary implication so far as the subject matter of the suit and anything involved in the decree itself are concerned, what reason is there for putting a different construction on the same words as applied to the decision of an issue? And if so far as what is involved in the decree is concerned any matter which might and ought to have been made ground of defence or attack must be taken to have been decided, there is in my opinion equally no reason for not applying the same principle with respect to a matter directly and substantially in issue in an issue in the previous suit. As I have already observed the language of explanation IV is equally applicable both to the previous suit itself and to an issue in the suit. What use is there in enacting that what ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit if the matter is not also to be taken to have been decided in the previous suit? What was not made ground of defence or attack could not have been expressly decided. The explanation would therefore be objectless if a decision also is not to be implied and made the ground of estoppel with respect to what is impliedly to be regarded as having been directly and substantially in issue. At any rate the logical result of the respondent's position must be to make an explicit decision equally necessary with respect to a ground of attack or defence not having been urged with regard to a matter involved in the decree itself in the previous suit. The learned Judge's position is no doubt supported by several decisions in the Calcutta High Court (*Kailash Mondal* v, *Baroda Sundari Dasi*[1] *Woomesh Chandra Maitra* v. *Barada Das Maitra*[2] but in my opinion these decisions are absolutely unsupportable and quite inconsistent with the decision of the Privy Council in *Pahalwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur*[3] and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*[4] even if the decision of the same tribunal in *Sri Gopal* v. *Pirthi Singh*[5] could be distinguished as stated by *Sankaran Nair*, J. on the ground

1. (1898) I. L. R. 24 C. 711.
2. (1900) I. L. R. 28. C. 17.
3. (1872) 12 Ben. L. R. 391 (P. C.)
4. (1912) I. L, R. 39 C. 527.
5. (1902) I. L. R. 24 A. 429.

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that the implication of a decision on an issue which ought to have been raised in the previous suit was justifiable in that case as the decree passed in the earlier suit would itself be affected otherwise. The Calcutta High Court however did not consider *Sri Gopal* v. *Pirthi Singh*[1] distinguishable on that ground. Mr. Justice Gurudas Banerjee who was a party to the decision in *Kailash Mondal* v. *Barod Sundari Dasi*[2] observed in *Rajendra Nath Ghose* v. *Tarangini Dasi*[3] that the position adopted by him in the previous case would require to be reconsidered in consequence of the decision in *Sri Gopal* v. *Pirthi Singh.*[1] The same view was taken by the Calcutta High Court in *Kailash Chandra Mandal* v. *Ram Narain Giri*[4], *Jamadar Singh* v. *Serazuddin Ahmad Chaudhuri*[5], and *Mohim Chandra Sarkar* v. *Anil Bandhu Adhikary*[6] although *Jamadar Singh* v. *Serazuddin Ahmad Chaudhuri*[5] might be explicable if the distinction adopted by Sankaran Nair J. be correct. This Court also has held that a ground of attack or defence which a party omitted to bring forward in an earlier suit must be taken to have been decided in the suit. See *Arunachellam Chetti* v. *Meyyappa Chetty*[7], *Masilamania Pillai* v. *Tiruvengadam Pillai*[8]. The point seems to be so obviously clear that it does not deserve further consideration.

According to the respondent's argument, although a matter not necessary to sustain the actual decree in an earlier suit will not be *res judicata* in a later suit if the decision on it is only by way of implication, yet it would be *res judicata* if it expressly decided it. That an express decision would constitute an estoppel was regarded by *Sankaran Nair*, J. as concluded by the decision of the Privy Council in *Pittapur Raja* v. *Buchi Sitayya*[9] to which might be added several other rulings. (See *Gobind Chunder Koondoo* v. *Taruck Chunder Bose*[10], *Soorjomonee Dasee* v. *Suddanund Mohapatter*[11], *Krishna Behari Roy* v. *Brojesweri Chowdranee*[12]. But the test laid down in these cases was not whether the decision was explicit but whether the issue was one on which the judgment in the previous suit was based, quite apart from the question whether the decree itself would be affected by the matter being re-opened in the later suit. If the judgment was not based on the issue then the decision of the issue whether express or implied cannot constitute the matter *res judicata* in the later suit.

1. (1902) I. L. R. 24 A. 429.
2. (1904) 1. C. L. J. 248.
3. (1878) I. L. R. 24 C. 711.
4. (1906) 4 C. L. J. 211.
5. (1908) I. L. R. 35 C. 979
6. (1909) 13 C. W. N. 513.
7. (1898) I. L. R. 21 M. 91.
8. (1908) I. L. R. 31 M. 385.
9. (1885) I. L. R. 8 M. 219.
10. (1878) I. L. R. 3 C. 145
11. (1873) 12 Ben. L. R. 304. P. C.
12. (1875) 2. I. A. 283.

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These are the general principles which in my opinion must guide the Court in determining whether the question of the correctness of the patta is *res judicata* by the decision in the previous suit for the rent of Fasli 1314. The point is, was the question of the propriety of the patta directly in issue in the previous suit and was it decided, expressly or by implication. In my opinion the question whether a decree for rent involves a decision that a proper patta had been tendered is one which must be decided with reference to the facts of each case. It is perfectly true as pointed out by *Sankaran Nair*, J. that the tender of a patta is not essential to a landlord to recover rent and that the parties may dispense with it. It may be right to go farther and say that a ryot may, if he choose, not insist on the tender of a proper patta before he pays rent for any particular year and that this will not affect his right to require a proper patta in any subsequent year and resisting a suit for rent on the ground that a proper patta has not been tendered. It may be open therefore to a defendant to raise no plea at all about the correctness of a patta in a suit instituted for the rent of a particular year; this may not estop him from resisting a subsequent suit for rent for another year on the ground that the patta alleged to be tendered is not correct. This may possibly apply even in cases where the plaintiff alleged in the earlier suit that he tendered a patta containing proper terms. But the effect of a decision depends in large measure on the actual contest between the parties. A party may not be bound to raise a particular plea, but if he does raise a plea which would be an effective answer to the suit then the same plea cannot be raised again in a later suit between him and his opponent. It may be that the actual decree alone in the previous suit with respect to its subject matter would not lead to an implication of the decision of a particular matter but if the matter is put in contest and the result of the contest would be that the judgment in the case must depend on the decision of the matter, then it is clear to my mind that the decision would constitute it *res judicata* in a subsequent suit and it is absolutely immaterial whether the decision be express or implied. Of course it is open to the parties to show that the contest on any matter was subsequently waived or that the court refused to decide the matter, but if neither of these events took place a decision by the court on the matter must necessarily be implied if it was not expressly decided. In the case before us we have a decree for rent. It is said this did not necessarily require a decision as to the terms of the patta or the extent of the land for which the rent was decreed. Is this correct when the terms of the patta or the specification of the extent of the land were impugned?

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When these questions were raised by the defendant could the court pass a Judgment for rent in the plaintiff's favor without determining them? The learned Judge seems to proceed on the footing that the question what is necessary to be decided in a suit is to be settled without reference to the pleas raised by the defendant. With all deference this seems to be an altogether indefensible position.

In *Pahalwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur*[1] a suit was instituted in the Shahabad Court for recovering certain land as an accretion to the estate of the plaintiff in that suit in the District of Shahabad. The defendant in the suit claimed the land as an accretion to his own estate in the District of Ghazipur. The Courts decided that the land was an accretion to the plaintiff's estate in Shahabad and not to the defendant's estate in Ghazipur. The defendant subsequently instituted a suit in the Ghazipur Court for the land to which the subject of the former suit was found to be an accretion. The Privy Council held that the holding in the earlier suit necessarily decided that the land claimed by the plaintiff in the later suit was in the District of Shahabad and that the Court of Ghazipur had no jurisdiction. It will be noted that the property in the two suits was different. Any plea as to the District in which the property in the later suit was situated was not a necessary one, the immediate question in the earlier suit being merely whether the land was an accretion to the property of the plaintiff or of the defendant in the suit; but the parties went to trial on the question whether the land was an accretion to the plaintiff's estate in Shahabad or the defendant's estate in Ghazipur and the issue which arose on their contest was regarded as determining the question in which district the property in dispute in the later suit was situate. Their Lordships observed "Now, no doubt, it might be possible to suppose cases in which the decision as to the accretion might not necessarily be a decision that the land to which it was accreted was within the local jurisdiction of the Court which had dealt with it. But all these questions must be tried with respect to the subject-matter in the particular suit; and it seems to their Lordships impossiple, in construing the section with reference to what was in issue in the former suit, to come to any other conclusion than that the decision did, by necessary implication, find that the green land was within the settled estate of the Maharaja in Shahabad. He came as plaintiff into court; he claimed the whole of the land as an accretion to his settled estate in Shahabad. From the map and the evidence, it is obvious that, if an accretion to his land, it could

1. (1872) 12 Ben L. R. 391 (P. C.)

be an accertion to nothing but the green land. The accretion was found to be an accretion to his land in the settled estate of Shahabad, and that proposition necessarily implied that the green land was a part of the settled estate of Shahabad."

In *Soorjomonee Dasee* v. *Suddanund Mohapatter*[1] the Privy Council held that if the right to certain property is contested on a ground equally applicable to that and other property, then the decision of the matter will be *res judicata* not only with regard to that property but with regard to all other property embraced by the ground on which the contest is based, and that the pleadings must be referred to to decide what matter was contested between the parties. Their Lordships observe "In their Lordships' opinion, the effect of the pleadings is that the plaintiff sought, *inter-alia,* to set aside the will on the ground that the testator had not the power to make any of the devises of realty that it contained inasmuch as he could not devise ancestral real property and all his real property was in point of law ancestral consisting of such as he had inherited from his father, and such as he had bought out of the income of it. .... If both parties invoked the opinion of the court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra vires.* To so hold would appear scarcely consistent with the case of *Mussamut Mitna* v. *Syed Fuzl Rul* [2] wherein it was held that in a case where there had been no issues at all, but where nevertheless it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid." This was a decision under Act VIII of 1859 which did not expressly lay down the rule of *res judicata* with regard to an issue in a suit. In *Tirbhuwan Bahadur Singh* v. *Rameshar Baksh Singh* [3] it was laid down by the Privy Council that the conduct of the parties must be considered in deciding whether an issue was material for the decision in the earlier suit. In *Aghore Nath Mukerjee* v. *Kamini Debi,*[4] *Mookerjee* and *Teunon* JJ. held that if a person who has no present interest in the bequests contained in a will is made a party to a suit which asked for the construction of the will and the determination of all rights created by it and he takes an active part in the contest relating to the construction, the decision of the court on the construc-

1. (1872) 12 Ben L. R. 304 (P.C.)
2. (1870) 13 M. I. A. 573.
3. (1906) I. L. R. 28 A. 727
4. (1910) 11 C. L. J. 461.

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tion would be *res judicata* against him. It is true that it is not always easy to decide what was directly and substantially in issue in a former suit. Issues are often framed by courts not only on points which are essential for the determination of the actual matter in controversy between the parties but also on subsidiary questions having more or less bearing on the essential points. A decision on such subsidiary questions need not necessarily make the matter raised by them *res judicata* in a subsequent suit where they become material for the decision of the matter then brought under contest. Again, a decision on one of two questions may be enough to determine a contest but both the questions might be adjudicated on and made the basis of the judgment. In such a case the matter raised in both the questions would be *res judicata* although if the judgment had been based on one of them alone the other would not be *res judicata*. Again, suppose a suit is instituted for the recovery of certain properties, the defendant might merely deny the plaintiff's title to those properties and the issues might relate only to the particular properties claimed. In such a case a pronouncement on points involving both the properties under litigation and other properties might not lead to estoppel by *res judicata*. But suppose the defendant rests his defence on a ground which admittedly covers both the properties claimed by the plaintiff in the suit and the other properties as for instance by claiming them all under a will and the issue as to the will is decided against him; then in that case if the plaintiff subsequently claims other properties under the will the question as to the will would obviously be *res judicata*. Suppose again a plaintiff claims on the basis of his right under a will some of the properties comprised in it and the defendant contests the genuineness of the will. The decision of the court that the will is or is not genuine will certainly bind both the plaintiff and the defendant in any litigation between the parties with reference to other properties in the will. In a suit for rent for a particular year it may often not be easy to determine whether any particular question raised relates only to the claim made for the year or is one which would affect the right to rent for other years also. The court has in each case to decide whether the issue covers the plaintiff's right to rent except for the year for which it is claimed. In *Vythilinga Mudaliar* v. *Ramachandra Naiker*[1], cited by Dr. Swaminathan for the respondent the question raised in the earlier suit for rent was whether the defendant was in possession of all the lands for which rent was claimed. This court held that any finding on the question would not be *res judicata* in a suit for rent for a subsequent year as the land of which the

1. (1904) 14 M. L. J. 379.

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defendant was in possession might not have been the same in both the years. Mr. Justice *Subramania Aiyar*, whose judgment was concurred in by Mr. Justice *Sankaran Nair*, observed however that a decision on a point which would affect the right to rent for both the years could not be disputed in the later suit. He observed (p. 383) "no doubt had the decision in the previous suit been to the effect that certain specific parcels constituted part of the inam, the choultry in the present suit could not, if it admitted the possession during the period in question here of those parcels, seek to make out that the parcels were not inam." *Nil Madhub Sarkar* v. *Brojo Nath Singh*[1] is probably supportable on similar grounds, although some of the observations in the judgment seem to be open to exception. In a very recent case *Kali Kumar* v. *Bidhu Bhusan*[2], *Mookerjee* and *Teunon*, JJ. held that an issue raised on the disputed point in a suit for rent and decided by a court would operate as *res judicata* in a subsequent suit for rent. *Mookerjee*, J. considers the point as settled beyond all controversy and refers to *Ekabbar Sheikh* v. *Hara Bewah*[3] and *Hara Chandra Bairagi* v. *Bepin Behari Das*[4] in support of his statement. The same view was taken by another bench of the Calcutta High Court in *Maharani Beni Pershad* v. *Raj Kumar*[5]. Sometimes in a suit for rent by a landlord against his tenant, a third party intervenes and claims the land as his own and it becomes difficult to decide whether a decision in the suit as to the plaintiff's right to rent would be *res judicata* in a subsequent suit regarding the title between the plaintiff in the previous suit and the intervenor. The questions material for deciding a right to rent as against a particular tenant are of course very different from the considerations that will arise in a suit for title between rival landlords. If the suit was in fact expressly or impliedly allowed to be expanded in character and was regarded also as one for the declaration of the landlord's title as against the intervenor and a decision as to title was arrived at, the finding might be *res judicata* in any subsequent proceedings between the two rival landlords. But a mere decree for rent against a tenant need not amount to any decision in a contest about title. This was the ground on which the decision of the Privy Council in *Run Bahadur Singh* v. *Lucho Koer*[6] proceeded, though estoppel by *res judicata* was avoided in that case on the ground also of the absence of concurrent jurisdiction in the court that decided the previous suit. In the present case the question raised in the previous suit, O. S. 430 of 1906 was whether

1. (1895) I. L. R. 21 C. 236.
2. (1912) 16 C. L. J. 89.
3. (1910) 13 C. L. J. 1.
4. (1910) 13 C. L. J. 38.
5. (1912) 16 C. L. J. 124.
6. (1885) I. L. R. 11 C. 301.

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patta tendered was proper. The terms in question did not relate to any incidents special for the year fasli 1314 but to the relationship between the plaintiff and the defendants generally as the owners of melwaram and the kudiwaram interests in the land respectively. Section 4 of the Rent Recovery Act VIII of 1865 required that the rent payable and all other material incidents of the tenancy should be stated in the patta to be tendered to the tenant and acccording to section 7 of the Act no suit was maintainable unless the landlord had previously tendered to the tenant such a patta as he was bound to accept. The defendants were not bound to accept a patta which was incorrect in any particular. If the extent was wrongly stated or the rent was stated to be payable in kind while any portion of it was not, they could refuse to accept the patta. The plea raised by them in substance was that there were defects in the patta which entitled them not to accept it and that the suit should therefore be dismissed. The question therefore was whether there were any such defects in the patta. The trial would of course proceed on the defects which the defendants insisted on. With regard to the issue whether the patta was proper or not the defendants were bound to raise all objections that they could to the contents of the patta and if they failed to do so they must be taken to have raised them and all points that they could have raised must be taken to have been impliedly decided against them. Suppose the defence in this case was that the plaintiff was not the holder at all of the plaint lands. Suppose that though the defendants raised that defence in the previous suit, the matter was not explicitly decided; or suppose they did not raise the defence at all. The question being one which related not merely to the rent for the particular year, 1317, but plaintiff's right to claim rent for any year the matter must be regarded as *res judicata*. It has been established by the cases in this court that a decision with regard to the proper terms of a patta to be tendered by a land-holder to his right for any one year is *res judicata* with regard to subsequent years, unless the terms related specially to the particular year or there was a change in terms of the tenancy (*Sree Venkatachalapati* v. *Krishna*[1], *Sellappa Chettyar* v. *Velayutha Tevan*.[2] In the latter case, the tenant did not object in the earlier suit to some of the stipulations in the patta. It was held by *Benson* and *Wallis*, JJ. that estoppel by *res judicata* was nevertheless applicable to the case. *Sankaran Nair*, J. distinguishes it from the present case on the ground that in both, the suits were to enforce acceptance of pattas and not for rent and that the decision that the patta is proper would necessarily involve a finding that the lands re-

1. (1892) I. L. R. 13 M. 287. 2. (1907) I. L. R. 30 M. 498.

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ferred to in the patta belong to the plaintiff. But the question raised related to some of the terms of the patta only and not to the ownership of the land. The trial of the question as to the ownership of the land in the later suit would not affect the decree in the earlier suit—the cause of action was different. The objections taken in the later suit were not expressly decided in the earlier suit. According to the tests adopted by the learned Judge *Sellappa Chettyar* v. *Velayutha Tevan*[1] must be regarded as wrongly decided. I am of opinion that the principle of that decision is clearly applicable to the present case. In both, the question raised bore on the relationship of the parties, not for the particular year in question in the earlier suit but subsisting between them during future years also. The defendant raised questions relating to the permanent relationship between the parties. He was entitled to raise them and his pleas, if successful, would be an effective answer to the plaintiff's suit. These are the tests for deciding whether the rule of *res judicata* is applicable. See *Natesa Gramani* v. *Venkatarama Reddi*[2]. Assuming therefore that the specific objections to the patta raised in this suit were not expressly decided in the previous suit, that point is immaterial. It is by no means clear however that one at least of the points was not decided. The finding was that the terms of the patta "did not contain any objectionable matter." The question as to the extent was certainly raised in the previous suit. There is nothing to show that the court did not decide everything that was comprised in the written statement of the defendants. The question as to whether the rent was not payable in kind for a portion of the lands was not raised in the written statement. Whether evidence was led with regard to it, it is impossible to say, but the court was entitled to try the issue as to the correctness of the patta on the pleadings in the case; and if any matter of attack with reference to the patta was not raised by the defendant he must be taken to have raised it, for any successful attack of the terms would be a complete defence to the suit for rent. I am of opinion therefore that the issue on the question of *res judicata* must be decided in the plaintiff's favour. I cannot agree with the respondent's contention that as the suit for rent related only to the year 1314, the defendant who resisted the suit on the ground that the terms of the tenancy were not properly embodied in the patta tendered by the plaintiff was entitled to keep back any objections on the ground that it would be profitable to him to do so with respect to that particular year. As the appellate court has not disposed of all the questions in the case, the case cannot be finally disposed of here. The decree of this Court in S. A. No. 640

1. (1907) I. L. R. 30 M. 498. 2. (1907) I. L. R. 30 M. 510.

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of 1909 and the decree of the lower appellate court must be reversed and the appeal remanded for fresh disposal according to law. All costs in this court must abide the result.

Sadasiva Aiyar, J :—The question for decision in this appeal is whether the defendants who are tenants under plaintiff (a landholder) are barred by *res judicata* owing to the decision in a previous suit brought by the plaintiff against them to recover rent for two previous Faslis (1314 and 1315) from setting up the contention that the patta tendered for the plaint Fasli (1316) contained improper terms as to the extent of the lands in defendant's holding and as to defendants' liability to pay waram rent for a portion of their holding and that hence they (the defendants) are not liable for the rent of Fasli 1316, the present suit having been brought to recover such rent.

2. The former suit brought for the rent of Faslis 1314 and 1315 is O. S. No. 430 of 1906. The Pattas tendered for those faslis contained practically the same entries as are found in the disputed patta for Fasli 1316. The defendants contended then (see Exhibit C), among other defences, that

(*a*) "The pattas alleged to have been tendered are not proper" *and*

(*b*) "The extent of defendants' jeroyati land has been very much overstated by plaintiff."

In the present suit also, they put forward the same defences though they gave more details, *viz.*,

(*a*1) That 3 acres are "cash-rent-paying lands."

and

(*b*1) the extent of lands liable to pay rent is 5 acres *plus* 3 acres (and not about 14 acres entered in the patta).

3. In the former suit, the very 1st issue raised the question "whether the pattas tendered are proper" and the finding of the Court was as follows:—

"The terms of the pattas Exhibits E and F do not contain any objectionable matter. I accordingly find the 1st issue in the affirmative." According to section 4 of the Rent Recovery Act VIII of 1865, "the patta shall contain...........the local description and *extent of the land; the* amount and *nature of the rent according as the same is payable in money or in kind or by a share of the produce etc., etc.*" Thus, when the Court in the former suit found no objectionable matter in the pattas for Faslis 1314 and 1315 and when

it found the 1st issue in the case (*viz.*, whether the pattas tendered were proper) in the affirmative, it clearly found,

(*a*2) that the nature of the rent payable for the entire lands is waram share of the produce as entered in the pattas, and

(*b*2) that the extent of the lands to pay rent is 14 acres as found in the pattas.

The court undoubtedly overruled defendant's contention that the extent was not 14 acres and that the pattas were also otherwise improper. It is not clear whether defendants at the trial of that suit prominently put forward the contention that 3 acres of the lands were liable to pay only cash rent and not waram produce but it cannot, in my opinion, be denied that when they attacked the pattas as containing improper terms, they were bound to put forward all the grounds on which they attacked the pattas as improper and could not be allowed to put forward some grounds of attack alone for one fasli and other grounds for other faslis. As has been decided in *Vythilinga Mudaliar* v. *Ramachendra Naicker*,[1] *Sellapa Chettyar* v. *Velayutha Tevan*[2], and *Natesa Gramani* v. *Venkatarama Reddi*[3], a decision as to the standing terms of a patta between a landlord and a tenant for one fasli is *res judicata* in respect of such terms for all subsequent faslis, though of course, the tenant might prove in a subsequent fasli that by the act of God or anything which has subsequently happened (*i. e.*, by proper relinquishment of a portion of his holding etc.) and which gives him a legal right to have the terms modified, the conditions and terms of the tenancy have been altered.

4. The pattas for Faslis 1314 and 1315 having been expressly found to be proper pattas (that is, to contain the proper extent of land in defendants' holding and proper rates and kinds of rent) in the former suit, the defendants are, in my opinion, clearly barred by *res judicata* from contending that a similar patta tendered for plaint fasli (1316) was not a proper patta. The learned Judge whose judgment is under appeal before this Full Bench held (if I understand rightly his observations in pages 5 to 8 of his judgment)

(*a*) that the question as to the extent of the lands to be entered in the annual patta and the kind of rent leviable on 3 acres of the holding was not "directly and substantially in issue" in the former suit because a decision on the above question was "not essential for the decree that was passed in O. S. 430 of 1906" and was "not

1. (1904) 14 M. L. J. 373. 2. (1907) I. L. R. 30 M. 498.
3. (1907) I. L. R. 30 M. 510.

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essential for the relief finally granted in the former case" as "a decree for rent does not necessarily involve" or require a decision as to the terms of the patta or the extent of the land for which the rent has to be paid."

(*b*) that assuming that a decision on that question was essential in the former suit, and assuming therefore that "the question must be deemed to have been directly and substantially in issue under Explanation IV to Section 11 of the Civil Procedure Code, even though the parties did not raise that question as they were bound to raise it," it did not follow that the question must be deemed to have been "*as a matter of fact*" "heard and decided."

(*c*) that in the former suit, the question in the present suit was not 'heard and decided' expressly and 'we are not bound to imply' that it was so decided.

(*d*) that the 'causes of action' and the 'subject-matters' of the two suits are different.

(*e*) that it 'is not enough' that 'a determination' in the present suit (about the extent of lands and rate of rent, 'would be inconsistent with the decision in the previous case that the patta then tendered was proper' to prevent such determination in the present suit by the bar of *res judicata*, and

(*f*) that on all the above grounds, the question in the present suit whether the patta for fasli 1316 is a proper one is not concluded by the decision in the former suit.

5. A decree for rent between an ordinary landlord and an ordinary tenant may not necessarily involve a decision as to the terms of the lease or as to the extent of land comprised in the lease. But a decision under the Rent Recovery Act VIII of 1865 where the landlord sued for rent on the allegation that the standing terms of the tenancy were contained in the patta tendered by him mentioning particular terms and the particular extent of the holding does, in my opinion, involve and require a decision as to whether the terms of the lease are proper and the extent of land covered by the holding is as alleged in the patta tendered by the landlord and hence the reason (a) given by the learned Judge seems to me to fail. The case in *Nil Madhub Sarkar* v. *Brojo Nath Singha*[1] quoted by the learned Judge is therefore not applicable and the earlier case in *Gobind Chunder Koondoo* v. *Taruck Chunder Bose*[2] and the cases in *Venkatachalapathi* v.

1. (1895) I. L. R. 21 C. 236. 2. (1877) I. L. R. 3 C. 145.

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Krishna,[1] *Natesa Gramani* v. *Venkatarama Reddi*[2], *Pittapur Raja* v. *Buchi Sitayya*,[3] and *Sellappa Chettyar* v. *Velayutha Tevan*[4], also quoted by the learned Judge and referred to by him with approval, seem to me to clearly govern this case.

6. I shall next deal with the argument that even though the question was directly and substantially in issue because the decision involved the finding on that issue, it must also have been heard and decided before it can be deemed *res judicata*. There are no doubt observations in *Kailash Mondul* v. *Baroda Sundari Dasi*[5], *Woomesh Chandra Maitra* v. *Barada Das Maitra*[6], and *Rajendranath Ghose* v. *Tarangini Dasi*,[7] to the above effect, but as pointed out by *Subramania Aiyar* J. in *Arunachalam Chetti* v. *Meyyappa Chetti* [8] if a Court is bound by Explanation II to section 13 of the old Civil Procedure Code (corresponding to Explanation IV to section 11 of the new Code), to adopt and act upon the fiction that a matter which might and ought to have been made a grouud of defence or attack in the former suit should be deemed to have been a matter directly and substantially in issue in such suit that same explanation necessarily imposes the duty of acting upon the further fiction that that matter was also heard and decided and adjudicated upon in the former suit. Explanation II to Section 12 would be meaningless as pointed out by the Allahabad High Court in *Sri Gopal* v. *Pirthi Singh*[9] if it were necessary in cases which were covered by it that the matter should have been, as a matter of fact, heard and finally decided in the previous suit. That case in *Sri Gopal* v. *Pirthi Singh* [9] follows the Privy Council cases in *Mahabir Pershad Singh* v. *Macnaghten*[10] and *Kameswar Pershad* v. *Rajkumari Ruttan Koer*,[11] and the interpretation of section 13 by the Allahabad High Court in that case was approved and adopted by the Privy Council when the case went on appeal before their Lordships in *Sri Gopal* v. *Pirthi Singh*.[12] The cases in *Kailash Mondul* v. *Baroda Sundari Dasi*,[5] *Woomesh Chandra Maitra* v. *Barada Das Maitra*,[6] and *Rajendranath Ghose* v. *Tarangini Dasi*[7] being opposed to the above decision of their Lordships of the Privy Council can, no longer, be considered good law. In fact, the Calcutta High Court itself in *Jamadar Singh* v. *Serazuddin Ahamad Chaudhuri*,[13] has virtually dissented from the cases in

1. (1892) I. L. R. 18 M. 287.
2. (1907) I. L. R. 30 M. 510.
3. (1885) I. L. R, 8 M. 219.
4. (1907) I. L. R. 30 M. 498.
5. (1898) I. L. R. 24 C. 711.
6. (1900) I. L, R. 28 C. 17.
7. (1904) 1 C. L. J. 248.
8. (1898) I. L. R. 21 M. 91 at 99.
9. (1198) I. L. R. 20 A. 110 at 113.
10. (1889) I.L. R. 16 C. 682 (P. C.)
11. (1893) I. L. R. 20 C. 79.
12. (1902) I. L. R. 24 A: 429.
13. (1908) I. L. R. 35 C. 979.

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Kailash Mondul v. *Baroda Sundari Dasi*[1] and *Woomesh Chandra Maitra* v. *Barada Das Maitra*[2]. At page 987 one of the learned Judges says [in *Jamindar Singh's case*[3]] "It is very difficult to see how a matter, which *ex hypothesi* was not before the former Court, could possibly have been heard and finally decided by it; and it seems to me that if this were necessary the whole of Explanation II (to section 13) would be rendered meaningless." Their Lordships also decided in that case that the decision in *Sri Gopal* v. *Pirthi Singh*[4] is good law and that it is not necessary that the subject-matter of the two suits must be the same before Explanation II to section 13 can be applied. I might however state that this question (*b*) does not really arise in this case because I am unable to agree with the learned Judge whose Judgment is under appeal that the present question was not as a matter of fact heard and decided in the former suit. In the statement of facts in the beginning of this judgment, I believe I have shown that the question was really heard and decided as the defendant raised the plea as to the impropriety of the patta in the former suit and his plea was expressly overruled. (See *Soorjomonee Dayee* v. *Suddanund Mohapatter*,[5] which decides that pleadings must be looked into to understand what was in issue and what was decided in the former suit.) The fact that the cause of action and the subject-matters of the two suits are different is immaterial because the only question is whether the decision in the former suit on certain issues of fact is *res judicata* in the present suit and it is not necessary under section 11 that the causes of action and the subject-matters of the two suits should be the same for a decision on issues of fact to constitute *res judicata* in a subsequent suit. Lastly, I am unable to hold that the decision as to the terms of the patta in the former suit was on a mere collateral question in the former suit. Section 11 does not use the word 'collateral but uses the words 'directly and substantially in issue.' The Privy Council case in *Misir Raghobar-dial* v. *Sheo Baksh Singh*[6] was dicided mainly on the ground that the court which tried the first suit was not competent to try the second suit and hence that the decision of an issue in the first suit was not *res judicata* in the second suit. There is an expression at page 445 of the judgment that the issue decided in the former suit was merely a "collateral" issue though the facts show that it was a direct and substantial issue. In the *Duchess of Kingston's*[7] case

1. (1878) I. L. R. 24 C. 711.
2. (1900) I. L. R. 28 C. 17.
3. (1908) I. L, R. 35 C. 979.
4. (1898) I. L. R. 20 A. 110.
5. (1873) 12 Ben. L. R. 304.
6. (1883) I. L. R. 9 C. 439.
7. 2 Smiths. L. C. 812.

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it would seem to have been held that where the court which decided the first suit was not competent to decide the second suit, the question of fact decided by the former Court though material for the decision must be deemed to have been "collateral" to the subject-matter of the first suit. It was with reference to that use of the word "collateral" that the Privy Council held that the court which decided the first suit dealt with that issue only as a collataral issue. If the Privy Council by their *obiter dictum* intended to state that the question was not directly and substantially in issue, in the former suit (a dictum irreconcileable with the Privy Council decision in *Pahalwan Singh* v. *Maharaja Muheshur Buksh Singh Bahadur*[1] such dictum must be held to have been overruled by their later decisions already set out including *Sree Gopal* v. *Pirthi Singh*[2]. The latest Privy Council case in *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh*[3] seems to me to be conclusive on the matter, for their Lordships decide that section 13 explanation II would bar a defendant who omits to raise a material issue in a former suit when he was a party thereto even though that issue was not as a matter of fact heard and decided in the former suit. The case in *Masilamania Pillai* v. *Tiruvengadam Pillai*[4] seems also to me to be conclusive on this question of *res judicata*. It is no doubt, not enough to constitute *res judicata* that a *determination contra* in a later suit would be inconsistent with the determination in the former suit; for there is also a further requisite that the court which decided the former suit should have been competent to decide the later suit. In this case, this latter requisite also is complied with and I am therefore clear that the findings of fact in the former suit are *res judicata*, one of those findings being that the defendants held the extent of lands mentioned in the patta tendered to them and are bound to pay rent according to the terms of the said patta.

7. I may now refer shortly to one important question which was lightly touched upon during the arguments, namely, whether where the subject-matter of the former litigation and the relief claimed therein were the same as those claimed in the subsequent litigation, the plaintiff can bring two suits on what is put forward by him as two different causes of action. The question does not really arise in this case but I wish to state that I agree with *Subramania Aiyar*, J. in *Arunachellam Chetty* v. *Meyyappa Chetty*,[5] that Courts should try their best to hold that the causes of action in such cases are substantially the same. I shall here quote *West*

1. (1872) 12 Ben. L R. 391.
2. (1902) I. L. R. 24 A. 429.
3. (1912) I. L. R. 39 C. 527.
4. (1908) I. L. R. 31 M. 385.
5. (1897) I. L. R. 21 M. 91.

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J's observations (quoted also by *Subramania Aiyar*, J. "Under systems such as the Roman Law or the English Common Law, in which the development of legal rights and duties has been greatly influenced by the re-action of a highly artificial mode of procedure, appropriate forms of action can be found for nearly all the ordinary cases which the legal consciousness of the community recognises as justifying an exercise of the coercive power of the State; but, as the variety of human relations greatly exceeds that of the conceptions, upon which a system of actions can be framed, it happens that the same transaction or group of circumstances may furnish a grouud for several different actions. In such cases, different causes of action arise to the party injured; but as it is felt that the same set of facts, which the mind at once grasps as jurally integral, ought not to be made the basis of repeated proceedings, the complaining party is allowed to frame his complaint in various ways, and the rule obtains that all the circumstances, which exist when the former of two actions is brought and can be brought forward in support of it, shall be brought forward then, not reserved for a second action arising out of the same events. The cause of action is regarded as identical, though the form of action differs on the second occasion, and the test applied is whether the evidence to support both actions is *substantially* the same (*Hitchin* v. *Campbell*[1], *Martin* v. *Kennedy*[2]). Under a freer system of procedure, such as that of the Equity Courts in England or of the Civil Courts in India, second suits are to be admitted more sparingly than when the plaintiff has to proceed by set forms of action. As he can bring forward his whole case unfettered by artificial restraints, and seek all remedies that the Court can justly award upon the facts proved, there is no reason why he should be permitted to harass his opponent and occupy the time of the courts by repeated investigations of a set of facts which ought all to have been submitted for adjudication at once. His cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the court's interference."

I am aware that *Benson* and *Bashyam Iyengar* JJ., in *Ramaswami Ayyar* v. *Vythinatha Ayyar*,[3] discuss some of the observations in the decision in *Arunachellam Chetty* v. *Meyyappa Chetti*[4] with disapproval and *Subramania Aiyar* J., himself in

1. 2 W. Bl. 827.
2. 2 Bos. & Pul. 69.
3. (1903) I. L. R. 26 M. 761.
4. (1898) I. L. R. 21 M. 91.

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Veerana Pillai v. *Muthukumara Asari*[1] said that "anything in the language used" by him in *Arunachellam Chetty* v. *Meyyappa Chetty,*[2] "inconsistent with the view of the law as expounded" in *Ramaswami Ayyar* v. *Vythinatha Ayyar*[3] "can no longer be treated as an authority." I am, however, inclined to hold, with due deference to the contrary opinions, that all the observations in *Arunachellam Chetty* v. *Meyyappa Chetty,*[2] as to the scope of the doctrine of *res judicata* are sound law and those observations in *Ramaswami Ayyar* v. *Vythinatha Ayyar*[3] which conflict with the views in *Arunachellam Chetty* v. *Meyyappa Chetty*[2] seem to me to draw rather fine distinctions and in my humble judgment would lead to unnecessary and undesirable multiplicity of litigation. However, in so far as any principle in *Arunachellam Chetty* v. *Meyyappa Chetty*[2] is directly inconsistent with the later Full Bench decision of the Madras High Court in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair,*[4] (which approves of the decision in *Ramaswami Ayyar* v. *Vythinatha Ayyar,*[3] but which does not refer to and does not expressly overrule *Arunachellam Chetty* v. *Meyyappa Chetty*[2]) though it expressly overruled only *Rangasami Pillai* v. *Krishna Pillai*[5], I am not anxious that such directly overruled principle should be again reconsidered. As at present advised, I do not see anything in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair,*[4] irreconcileably inconsistent with any observation in *Arunachellam Chetty* v. *Meyyappa Chetty*[2] as two separate mortgages can be separately redeemed, especially if there is an express understanding to that effect between the parties and all that *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair*[4] decided was that the failure of a suit to redeem one mortgage is not a bar to a suit to redeem another.

8. I would for the reasons mentioned in paragraphs 5 and 6 of this opinion reverse the judgment of the lower courts and remand the case to the lower appellate court for a fresh disposal of the appeal before it, the District Munsif not having decided the questions involved in issues 4 and 5 and the lower appellate court also not having considered all the issues. The costs hitherto will abide the result.

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1. (1904) I. L. R. 27 M. 102.
2. (1897) I. L. R. 21 M. 91.
3. (1903) I. L. R. 26 M. 760.
4. (1903) I. L. R. 26 M. 153.
5. (1898) I. L. R. 22 M. 259.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Rathna Mudali ... ... *Appellant* (*Plaintiff*) *

v.

Perumal Reddy and others ... *Respondents* (*Defendants*)

T. P. A. S. 91—Redemption by part owner of equity of redemption—Whole if entitled to redeem against the will of the mortgagee and other sharer.

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The owner of a definite share of the equity of redemption cannot as a matter of right insist on redeeming the whole of the equity of redemption against the will of the other owners in the equity of redemption, and that of the mortgagee. *Kondarakayil Mamu* v. *Kuttu*[1] *Thachi Chettiar* v. *Ramanatha*[2] commented on by *Sundara Aiyar* J. *Huthasanan Numbudri* v. *Parameshwaran Numbudri*[3], *Krishnayya* v. *Muthukumarasami Pillai*[4] diss. by *Sadasiva Aiyar* J.

Per *Sadasiva Aiyar* J :—*Obiter*:—A mortgagee can release his lien on any portion of the mortgaged property or sue for the sale of any other portion of the mortgaged property though such release or abstention would not affect the rights or liabilities as between themselves of the owners of the different portions of the equity of redemption.

Second appeal from the decree of the Court of the District Judge of Chingleput in A. S. No. 147 of 1910 presented against the decree of the Court of the District Munsif of Chingleput in O. S. No 513 of 1908.

T. S. Narayana Sastry for Appellant.

S. Srinivasa Aiyangar for Respondent.

Narayana Sastry cited *Mammu* v. *Kutti*[1], *Narayan* v. *Ganpat*,[5] *Narotham Bhave* v. *Vittal Bhat*,[6] *Thillai Chetti* v. *Ramanatha Aiyar*,[2] *Nilakant Banerjee* v. *Suresh Chandra Mullick*.[7]

S. Srinivasa Aiyangar referred to Sec. 60 of the T. P. Act. *Harikishen Bhagat* v. *Veliah Hossein*,[8] *Ponnusami Mudaliar* v. *Srinivasa Naickan*,[9] *Krishna Aiyar* v. *Muthukumarasawmy Pillai*,[4] *Mahadaji Hari* v. *Ganpatshet*,[10] *Kudhai* v. *Sheo Dayal*,[11] *Hall* v. *Heward* [12] and *Pearce* v. *Morris* [13] do not support the

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*S. A. No. 1219 of 1911. 1st October 1912.

1. (1882) I. L. R. 6 M. 61.
2. (1896) I. L. R. 20 M. 295 at 298.
3. (1898) I. L. R. 22 M. 209.
4. (1905) I. L. R. 29 M. 217 at 229.
5. (1896) I. L. R 21 B. 619.
6. (1886) I. L. R. 10 B. 648.
7. (1885) I. L. R. 12 C. 414 (P. C.)
8. (1903) I. L. R. 30 C. 755.
9. (1908) I. L. R. 31 M. 333.
10. (1890) I. L. R. 15 B. 257.
11. (1888) I L. R. 10 All. 570.
12. (1886) 32 Ch. D. 430.
13. (1869) L. R. 5. Ch. 227.

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learned judges in *Huthasanan Nambudri* v. *Parameswaran Nambudri*[1]

Narayana Sastry referred to *Kesri* v. *Sett Roshan Lal*[2].

The Court delivered the following

Judgment.—*Sundara Aiyar.*—The facts of this case so far as they are necessary for the decision of this second appeal are briefly as follow. One Vedachala executed an usufructuary mortgage deed to one Thangavelu on the 7th April 1900, Ex. II. This mortgage was subsequently transferred to the 2nd and 3rd defendants in the suit. The 1st defendant is the heir of Thangavelu. Vedachala had three sons. He and each of the sons were therefore entitled to a fourth share in the property. On the 2nd May 1900 two of the sons Singaravelu and Tiruvengada sold their half share of the property to the 4th defendant. The mortgagees, the 2nd and 3rd defendants received half of their debt from the 4th defendant and gave up possession of a portion of the properties to him.

The plaintiff obtained a transfer of the equity of redemption from Vedachela and his remaining son and he has instituted his suit for redemption of the mortgage. He claims to be entitled to be put in possession of the whole property mortgaged by Vedachala on payment of the whole amount and is not content with a decree for possession of half the property on payment of half the mortgage amount. The 4th defendant resists the plaintiff's attempt to recover the whole of the property and contends that as he has become the owner of half of the equity of redemption and the plaintiff entitled only to the remaining half, he should not be allowed to recover possession of more than half of the properties and he claims to be entitled to retain possession of the property in his possession as representing the share of his transferors. The District Munsif gave the plaintiff a decree for the whole property. On appeal the District Judge modified the Munsif's decree holding that the plaintiff was not entitled to recover the whole of the property and held that on payment by the plaintiff of half of the mortgage amount, the plaintiff and 4th defendant should be held to be jointly entitled to the possession of the mortgaged lands. The second appeal to this court is preferred by the plaintiff and he contends that he is as a matter of right, entitled to recover the whole of the property mortgaged under Ex. II. The question for decision is whether the plaintiff is entitled as a matter of right to redeem the whole of the mortgage and to recover possession of the whole of the property in the circumstances

1. (1898) I. L. R. 22 M. 209. 2. (1870) 2. N. W. P. 415.

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of the case. It will be noticed that the mortgagees have split up the mortgage so far as they could by receiving a portion of the mortgage amount from the 4th defendant, the assignee of half of the equity of redemption and the 4th defendant has now become the owner of a share both in the equity of redemption and mortgage. Sec. 91 of the Transfer of Property Act lays down that any person having an interest in the right to redeem the property may redeem or institute a suit for redemption of the mortgaged property but I do not think that it lays down that a person who is entitled to a share only of the equity of redemption has under all circumstances, the right to insist on redeeming the whole of the mortgage and recovering possession of the whole of the mortgaged property. Sec. 60 enacts that a person entitled to a share only of the mortgaged property is not entitled to redeem his share only on payment of a proportionate part of the amount remaining due on the mortgage, and lays down an exception where a mortgagee has acquired in whole or in part a share of the mortgagor. The mortgagee under this section has ordinarily a right to insist on treating the mortgage as indivisible and on the redemption of the whole mortgage. But he cannot do so where he has split up the equity of redemption by becoming the owner of a part of it himself. I do not think that there is any principle of justice which requires that a person who is entitled only to a part of the equity of redemption should necessarily he held to have a right to redeem the whole of the mortgage. If there are several persons in whom the equity of redemption is vested, there is no reason why one of them and the mortgagee acting together should not be held to be entitled to deal with his interest in the equity of redemption and the mortgagee's right as against him provided the rights of the other owners in the equity of redemption are not thereby injuriously affected. Of course nothing done either by a mortgagor or a mortgagee behind the back of the other can affect the right of that other so as to injure him in any way. Where the mortgagee has dealt with one of those entitled to the equity of redemption, it has been held that a person entitled to the remainder may claim to redeem his share only of the equity of redemption. See *Marana Ammanna* v. *Pendyala Perubhotulu*[1], and *Subramaniam* v. *Mandayan*[2]. It has also been held that a mortgagee may claim to recover the share of the debt due from a person entitled to a portion of the equity of redemption when he has already entered into an arrangement with the owner of the remainder provided the right of the defendant is not prejudiced by the arrangement entered into between the mortgagee and the defendant's co-owners of the

1. (1881) I. L. R. 3 M. 230.

2. (1886) I. L. R. 9 M. 453.

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equity of the redemption. See *Hari Kishen Bhagavat* v. *Valiat Husain*[1], *Mahadaji Hari Lenaji* v. *Ganapat Shet Dhoud Shet*,[2] *Brijkishore* v. *Madho Singh*,[3] and *Venkatachala Chetty* v. *Sreenivasavaradachariar*.[4] In *Lakshmanguruaraja Naik* v. *Madhu Kristo Shervai*,[5] it was held that the mortgagee was entitled to have an account taken between him and the owner of a part of the equity of redemption when he had already settled his rights as against the owner of the remainder of the equity. The objection to a mortgagee splitting up a mortgage is entitled to weight only where the owner of a part of the equity of redemption is prejudicially affected by the splitting. In *Huthasanan Nambudri* v. *Parameswara Nambudri*,[6] it was no doubt held by this court that a person entitled to a part only of the equity of redemption had a right to redeem the whole notwithstanding the mortgagee's objection that he should not be permitted to redeem more than his share of the equity. In that case the persons who were entitled to the remainder of the equity were parties to the suit and also seem to have resisted the plaintiff's attempt to redeem the whole. It does not appear whether they claimed to continue the mortgage in so far as their shares were concerned. The decision proceeded on the principle that a mortgage contract was indivisible and that it was the right equally of the mortgagor and mortgagee to keep it indivisible. The judgment was based on some decisions of the English Courts *Pearse* v. *Morris*,[7] and *Hall* v. *Heward*,[8] but in those English cases the plaintiff's co-owners in the equity of redemption were not parties and it does not appear that they objected to the redemption of the whole of the mortgage by the plaintiff. I cannot see any principle on which it should be held that even if some of the co-owners of the equity of redemption should desire to continue the mortgage of their shares one of the co-owners be held to be entitled to redeem the whole of the mortgage. I do not think that *Huthasanan Nambudri* v. *Parameswara Nambudri*,[9] intended to go the length of laying down such a general rule and certainly the English cases which were followed there did not propound any such rule. The question whether the court will allow redemption of the whole of the mortgage at the instance of a person entitled to a part only of the equity of redemption must depend on the circumstances of each case, and the rights acquired by

1. (1903) I. L. R. 30 C. 755.
2. (1890) I. L. R. 15 B. 257
3. (1905) I. L R. 28 A. 279.
4. (1904) I. L. R. 28 M. 552.
5. (1890) I. L. R. 15 B. 186.
6. (1904) I. L. R. 28 M. 209.
7. (1869) 5 Ch A. 227
8. (1886) 32 Ch. D. 430.
9. (1898) I. L. R. 22 M. 209.

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the mortgagee or by third persons subsequent to the mortgage. In this case there is no reason why the plaintiff should first be allowed to redeem the whole of the mortgage and the 4th defendant who has a right both of a mortgagee and mortgagor be left to bring a fresh suit for recovering his share of the equity of redemption from the plaintiff. In 2 cases *Marakar Akath Kondara Kayil Mamu* v. *Punjapatath Kuttu*,[1] and *Thachi Chettiar* v. *Ramanatha Aiyar*,[2] it was held that when the plaintiff was entitled only to a part of the equity of redemption and the defendant entitled to another part the plaintiff could not sue to redeem at all without first getting a partition of the equity of redemption. With all respect it seems to me that those have gone too far in holding that the plaintiff's suit should be altogether dismissed. It may be noted that in those cases it was the mortgagee himself who had acquired a share of the equity of redemption and there was in my opinion, the less reason for holding that a partition should be first effected between the parties to the suit before a suit for redemption could be maintained. In Bombay on the other hand, it was held that notwithstanding that the mortgagee had become owner of a part of the equity of redemption, the mortgagor was entitled to insist on redeeming the whole mortgage. See *Mora Joshi* v. *Ramachandra Dinkar Joshi*[3] and *Narayan* v. *Ganapat*.[4] In my opinion, both the Madras cases and the Bombay cases mentioned above are *contrary* to the principle of the proviso to S. 60 of the Transfer of Property Act.

I can see no reason why on the facts found there should not be a decree for partition in this case so as to allow plaintiff to recover half the properties included in the mortgage? The 2nd and 3rd defendants did not claim to be entitled to any part of the properties now. The 4th defendant according to their admission is entitled to all that the plaintiff cannot claim. I ought to notice a contention that Vedachala was himself entitled to the whole of the property and that the 4th defendant acquired no right by the conveyance he obtained from the two of the sons of Vedachala. I am unable to see that this contention was put forward in either of the Courts below. It has not been raised even in the memorandum of second appeal. It was held in O. S. 261 of 1901 which was instituted by the original mortgagee Thangavelu against Vedachala and his sons and the 4th defendant that the latter was entitled to the shares of the two sons that were conveyed to him subject to the mortgage in Thangavelu's favour. The plaintiff in this suit did not as I have already observed,

1. (1882) I. L. R. 6 M. 61.
2. (1896) I. L. R. 20 M. 295.
3. (1890) I. L. R. 15 B. 24.
4. (1896) I. L. R. 21 B. 619.

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contend in the lower courts that Vedachala was solely entitled to the property. No doubt the plaintiff's object in insisting on recovering possession of the whole property is to make an attempt to set up a claim to the whole in case the 4th defendant be driven to another suit for recovering the shares of his transferors. I don't think that this course should be followed. The learned Vakil for the appellant consents to a decree for partition if we hold that he ought not to be allowed to redeem the whole mortgage. I have already held that the plaintiff was in no way prejudicially affected by the mortgagee's splitting up the mortgage and receiving half the amount due to him from the 4th defendant and I am therefore of opinion that the decree of the lower appellate Court should be modified by the plaintiff being allowed to redeem only half the properties on payment of half the mortgage amount is Rs. 187—5—0. The plaintiff will be put in possession of half the properties included in the mortgage deed after a fair partition between him and the 4th defendant. The 4th defendant must be put in possession of the remainder. It would be desirable to allot the lands in 4th defendant's possession to him in partition in so far as that can be done without injustice to the plaintiff. In the circumstances we think the parties should bear their own costs throughout.

Sadasiva Aiyar J.—I do not think it necessary to set out the facts which have been mentioned in some detail in the judgment just now pronounced by my learned brother. I shall content myself with making some observations on the principal question of law involved in this case. It is unnecessary for the purpose of deciding on that question of law to consider the cases where the objection of the mortgagee to partial partition by the owner of a fraction of the equity of redemption was allowed as a valid objection or the cases where a similar objection of the mortgagee who had himself split up the mortgage was disallowed. Such cases have very little relevancy to the question in dispute before us.

In the Privy Council Case *Nawab Aymal Alikhan* v. *Jowahir Singh* [1] their Lordships say at page 416 that co-mortgagors who were entitled only to a portion of the mortgaged property could not redeem against the will of the mortgagee any portion of the mortgaged property except the one village in which co-owners (the plaintiffs) were interested. That suit was brought by the purchasers of the equity of redemption in one of the four mortgaged villages for redemption of all the 4 villages. And their Lordships say that the mortgagee "if desirous of retaining pos-

1. (1870) 13 M. I. A. 404

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session" of the other three villages "as mortgagee was entitled to do so against the plaintiffs whose rights in that case were limited to the redemption and recovery of their village Hissanipur upon payment of so much sum deposited in Court represents the portion of the mortgage debt chargeable on that village." I think that this opinion of the Privy Council is binding on us and I therefore do not propose to deal with Indian and English cases decided before and after the Privy Council decision and I shall make reference only to a few of the latest cases. In *Munshi* v. *Daulat*[1] it was held, following *Kuramul* v. *Purumal*[2] that where all the proprietors of an estate joined in mortgaging it and the mortgagee subsequently purchased the share of one of the mortgagors and when another mortgagor sued to redeem his own share and also the share of yet another mortgagor, the plaintiff could only redeem his own share. In *Mir Esuff Ali Haji* v. *Panchanan Chatterjee*[3] the following observations occur: "Now what was the true position of the mortgagors when they transferred a portion of the property to Henasatulla, who obtained a release from the mortgagee by payment of a sum of money? It is a firmly settled doctrine that as between the original parties, the release of a part of the premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt. No doubt as against others who have liens upon the remainder of the mortgaged premises, a mortgagee with notice of such lien has no right to release any portion of the mortgaged premises to the injury of the owners of such liens. To put the matter in another way, as between the mortgagor and mortgagee the latter is not entitled to release a portion of the hypothecated property and diminish their own security to that extent. While therefore we adhere to the view taken in the cases *Imam Ali* v. *Baij Nath Ram Sahu*[4] and *Hakin Lal* v. *Ram Lal*[5] that the mortgagee who has security upon two or more properties which he knows belongs to different persons cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected (*Kettlewell* v. *Watson* [6]) we are of opinion that this doctrine has no application to the present case where the release took place at a time when the appellants had not purchased any interest in the mortgaged premises, and the mortgagors alone were the persons affected by the release. We must not however be assumed to adopt the rule laid down by the learned Judges of the Allahabad High Court that such a release may be

1. (1906) I. L. R. 29 A. 262.
2. (1879) I. L. R. 2 A. 565.
3. (1910) 15 C. W. N. 800 at p. 805 & 806; 11 C. L. J. 639.
4. (1906) I. L. R. 33 C. 613.
5. (1907) 6 C. L. J. 46.
6. (1882) 21 Ch. D. 686 at 714.

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granted even to the prejudice of persons who had previously acquired an interest in the mortgaged properties. That view is clearly opposed to the principles of equity, justice and good conscience, and though recognised in *Sheo Prasad* v. *Bagan Lal*[1] *Musri Lal* v. *Muthu Lal*[2] *Sheo Takal Ozhem* v. *Sheo Dan Rai*[3] and *Pirbu Narayan Singh* v. *Amir Singh*[4] was not adopted in *Ram Ramjan Chakravarthi* v. *Indra Narain Das*[5]. The case in *Krishnayyar* v. *Muthukumarasamy Pillai*[6] which lays down a similar principle cannot to that extent be supported. The contrary view which accords with the rule adopted by this court was followed in *Ponnusamy Mudali* v. *Perianna Naikar*[7]. It is again unnecessary for the purpose of deciding this case to express a final opinion on the question whether the mortgagee himself as plaintiff can sue for sale of a portion alone of the mortgaged property after releasing the other portions at his pleasure. As at present advised, and notwithstanding the great respect I have for the opinions to the contrary including that of Ashutosh Mukerjee J., I do not see any objection on principle to the mortgagee doing so. A mortgagee can sue for a personal decree alone against his mortgagor giving up all claims to bring any portion of the mortgaged properties to sale if he so desires why should he not therefore be allowed to sue for the sale of a portion of the mortgaged property for the whole (or the portion remaining due and unpaid) of his mortgage money, leaving the owners of the equity of redemption in the mortgaged properties to settle their claims as between themselves either in the same suit (if convenient) or in another suit ? He would of course be barred afterwards from attaching other portions of the mortgaged properties and bringing them to sale in execution of the money decree he obtained. He might also perhaps be barred from again suing for a mortgage decree for sale of the other portions left out in his first suit for sale. But these considerations have nothing to do with his right to release any portion or to sue for the sale of a portion only of the mortgaged property though such release or abstention would not affect the rights and liabilities as between themselves of the owners of the different portions of the equity of redemption in the mortgage properties. If he has himself purchased any portion he must of course make proportionate abatement of the mortgage amount when bringing a suit for sale. In the present case the plaintiff claims only an undivided half share in the mort-

1. (1902) I. L. R 25 A. 79.
2. (1905) I. L. R. 28 A. 19.
3. (1905) I. L. R. 28 A. 174.
4. (1907) I. L. R. 29 A. 369.
5. (1906) I. L. R. 33 C. 890.
6. (1905) I. L. R. 29. M. 217.
7. (1908) I. L. R. 31 M. 333.

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gaged property. Therefore it seems to me that *against the will of the mortgagee* and of the 4th defendant who has obtained half the mortgagee's interest by paying half the mortgage money to the mortgagee and half share in the equity of redemption by purchase of same from two out of four owners of the equity of redemption the plaintiff cannot claim to redeem more than plaintiff's half share of the mortgaged properties. As I said before I hold this view following *Kuray Mall* v. *Puran Mul*[1] *Munshi* v. *Daulet*[2] and *Nawab Aymal Ali Khan v. Jowhar Singh.*[3]

There are no doubt some comparatively old cases and some English cases in which it was said that a mortgagee could not compel even the owner of only a portion of the equity of redemption to redeem only that portion. But in most of those cases it does not appear that the owners of the other portions of the equity of redemption were parties to the suit or objected to the plaintiffs redeeming the whole. Any such case like *Huthasanan Nambudri* v. *Parameswara Nambudri*[4] which decided that even in that state of circumstances the plaintiff is entitled to redeem the whole against the will of the mortgagee and against the wishes of the other owners of the equity of redemption, I respectfully dissent from. I am also against making any distinction between cases where the mortgage is split up (*a*) by the mortgagee releasing certain of the properties or certain share of the properties comprised in the mortgage (*b*) by himself purchasing a portion of the mortgaged property and (*c*) by the joint owners of the equity of redemption effecting a partition of their properties either by metes and bounds or by agreeing to hold the property in common in definite shares instead of jointly. I hold generally that against the mortgagee's consent the owner of a definite share of the equity of redemption should not be entitled to redeem more than his share unless the owners of the other shares consent, or do not object to plaintiff's redeeming their shares also. The very general words of sec. 91 of the Transfer of Property Act "any person having any interest in or charge on a property can institute a suit for the redemption of the mortgaged property" cannot be construed to mean that a plaintiff who owned only a fractional share can redeem shares other than his own when the owners of those other shares object to his redeeming their fractions or contend that their shares have already been redeemed by them. In the above view the decree of the Lower Appellate Court allowing plaintiff to redeem the plaintiff's half share alone on payment of half the mortgage amount (which half of the mortgage amount alone remains due to the mort-

1. (1879) I. L. R. 2 A. 565.
2. (1906) I. L. R. 29 A. 262.
3. (1870) 13 M. I. A. 404.
4. (1898) I. L. R. 22 M. 209.

gagee) and allowing the plaintiff in execution to be put in possession of his half share by permitting him to take possession of the whole land as common owner with the 4th defendant seems to me to be correct. Strictly speaking the second appeal should be dismissed as plaintiff and 4th defendant did not express their consent in the Lower Court to have a partition effected between them; see *Theabala Chetti* v. *Ramanatha Aiyar*.[1] But as before us the plaintiff and the 4th defendant have so consented to an order allowing partition on redemption, I concur in the decree proposed by my learned brother..

Rathna Mudali v. Perumal Reddy.

Sadasiva Aiyar J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer.

T. V. Veera Raghavan Pattar—Petitioner. *(3rd Counter Petitioner*)*

v.

Vatasseri Para Mannadissier and others: *Respondents Petitioners.*

C. P. C. O. 21 r 89 (b)—Amount specified in the proclamation of sale.

In an application to set aside a sale on deposit under O. 21 r. 89. it is necessary to deposit under Cl. b of r. 89 only the amount specified in the sale proclamation as that for the recovery of which the sale is ordered not the amounts of the decrees of other judgment-creditors entitled to rateable distribution.

Veera Raghavan Patter v. Mannadissier.

Petition, under S. 115 of Act V of 08 praying the High Court to revise the order of the Court of the District Judge of South Malabar in Civil Miscellaneous Appeal No. 1 of 1910 presented against the decision of the Court of the District Munsif of Palghat in M. P. No. 1882 of 09, O. S. No. 312 of 1899.

T. K. Govinda Aiyar for petitioner.

The Hon'ble Advocate-General (P. S. Sivaswami Aiyar) and *K. P. Govinda Menon* for respondent.

T. K. Govinda Aiyar.—The cases followed by the judge were under the old Code; and the law has changed under the Act of 1908. Now, even deposits made under O. 21 r. 89 are subject to the operation of Sec. 73 which says that the costs shall be rateably distributed. The sale can't be set aside if the particular decree-holder is not paid in full according to the rule itself—vide *Pita* v. *Chuni*[2] *Hari Sundari Dasye* v. *Shashi Baba Dasye*[3] Woodroffe and Ameer Ali

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*C. R. P. No. 871 of 1910. 4th October 1911.

1. (1866) I. L. R. 20 M. 295.
2. (1906) I. L. R. 31 B. 207 at 214.
3. (1896) 1 C. W. N. 195 at 196.

Veera Raghavan Pattar v. Mannadissier.

C. P. C. p. 975. So the sale can be set aside only on payment of such a sum as, when rateably distributed, will satisfy in full the particular decree-holder, *i.e.* all the decree-holders should be paid off. The sale is for the benefit of all decree-holders, *Kartik* v. *Sarbanund*[1] and it is immaterial under whose decree the sale takes place, *Bykant* v. *Rajendra.*[2] The particular decree-holder cannot stop the sale as soon as the amount of his decree is obtained. *Mohunt Meg Lall Pooree* v. *Shib Prasad Madi*[3], *Kunhi Moosa* v. *Makki*[4]. Sec. 73 gives a substantive right. After vesting it cannot be defeated and hence rule 92 provides for notice to all interested persons. Decree-holder includes decree-holders claiming rateable distribution *Lakshmi* v. *Kuthurani*[5] O. 21 r. 89 applies only if there are no other decree-holders entitled to rateable distribution.

P. S. Sivaswami Aiyar.—The language of the rule is clear and unambiguous. It refers to the claim of the particular decree-holder only. The omission is intentional, because in the next rule mention is made of persons entitled to rateable distribution. The language and position of Sec. 73 in the body of the Code cannot affect this rule, which is not made subject to any other section or rule. Most of the cases cited were decided before the introduction of S. 310 A and they afford no guidance as to the meaning of the rule. The particular decree-holder is the person solely entitled to the deposit, *Roshon Lal* v. *Ram Lal Mullick*[6], *Behari Lall* v. *Gopal Lal.*[7] The observation at p. 214 in *Pita* v. *Chuni*[8] is obiter. Notice is to be given because there may be many other reasons why the application should not be granted. *Lakshmi* v. *Kuthurani*[5] and other cases relate to the word 'decree-holder' in Sec. 311. Moreover nobody is prejudiced, because the other decree holders have the benefit of Sec. 64 and they can bring the same property again to sale.

T. K. Govinda Aiyar. The Privy Council went against the plain meaning of Sec. 240 of the Code of 1859 (276 of 1882). The prime object is to be looked at. Rule 90 only gives legislative sanction to the view in *Lakshmi* v. *Kuthurani*[5]. Even if S. 74 has any bearing, the very object of Sec. 73 is to avoid unnecessary multiplicity of proceedings *Bithal Das* v. *Nanda Kishore.*[9]

The Court delivered the following

1. (1885) I. L. R. 12 C. 317 at 321.
2. (1885) I. L. R. 12. C. 333, 337.
3. (1881) I. L. R. 7 C. 34, 37, 38.
4. (1900) I. L. R. 23 M. 478, 482.
5. (1885) I. L. R. 10 M. 57.
6. (1903) I. L. R. 30 C. 262.
7. (1896) 1 C. W. N. 695.
8. (1906) I. L. R. 31 B. 207 at 214.
9. (1900) I. L. R. 23 A. 106.

Veera Raghavan Pattar v. Mannadissier.

Judgment:—A sale of immoveable property having been held in execution of a decree and other decree-holders having come in under S. 73 C. P. C. for a rateable distribution of the assets, a prior mortgagee applied under O. 21 r. 89 to have the sale set aside on his depositing 5 per cent. of the purchase money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. The District Munsif dismissed the application holding that the latter amount included "the amounts of all the decree holders' claimable rateable share," an expression from which it is not clear whether he meant the whole of their decrees or only so much as they would have got on a rateable distribution taking place. On appeal the District Judge reversed the Munsiff's order and set aside the sale. It is now contended that the District Judge's order was wrong, as the deposit should have included the amounts of the decrees of the decree holders applying for rateable distribution. I am unable to accede to this contention. It is true that it has been held that a judgment-creditor who has applied to participate in the assets of a sale conducted on the attachment of another judgment-creditor although he may not have made any attachment of the property, is entitled to have the sale proceeded with to satisfy his decree after the decree of the attaching creditor has been satisfied (*Mohunt Mag Lall Pooree* v. *Shib Pershad Madi*[1]) and the sale may therefore be said to be for the benefit of decree-holders who have applied for execution other than the attaching creditor, but this is far from imposing on the judgment-debtor or person otherwise interested an obligation not authorised by any section of the Code. In *Lakshmi* v. *Kutthurani*[2] on a consideration of the wording of Ss. 2 and 295 of the Code of 1882 this Court held that 'decree-holder' in S. 311 included other decree-holders applying for rateable distribution so far as applications to set aside sales on the 'ground of irregularities' were concerned. The principle, that a sale in execution of a decree enures for the benefit of other decree-holders who have applied for execution besides that decree-holder at whose instance the property is sold is recognised in *Kashi Nath Roy Chowdhury* v. *Surbanand Shaha*[3] and in *Bykant Natt Shaha* v. *Rajendra Narain Rai*[4]. It has to be noticed however that all these rulings were antecedent to the insertion in the Code of S. 310 A under Act V of 1894, and they afford no clue to the interpretation of the word 'decree-holder' in that section. Coming now to Rule 89 Order 21 of Act V of 1908 which governs the present case, the language is clear enough. The

1. (1881) I. L. R. 7 C. 34.
2. (1886) I. L. R. 10 M. 57.
3. (1885) I. L. R. 12 C. 317 at p. 321
4. (1885) I. L. R. 12 C. 333.

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person who applies to set aside a sale under this section besides depositing 5 per cent. of the purchase money " for payment to the purchaser must deposit for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered." It would be doing violence to the English language to construe the words 'the amount specified in the proclamation of sale' as meaning and including the amounts due by the judgment-debtor to all other decree holders who have applied under S. 73 for execution of their decrees. Again, when the succeeding rule dealing with the setting aside of sales for fraud or irregularity contains expressly the words 'the decree-holder or any person entitled to share in a rateable distribution of assets,' there is no reason why the words 'or any person entitled to share in a rateable distribution of assets' should be read in after the word 'decree-holder' in rule 89 where they do not exist. On a consideration of the language of rule 89 of Order 21 of the present Code I am clearly of opinion that the appellant's contention is untenable, and it will not help him that rule 92 provides for previous notice being given to all persons likely to be affected by such an order and seems to contemplate that a court is not bound in its discretion in every case to allow applications under rule 89 or that the wording of the new S. 73 is a little different from that of the old S. 295.

Under the old Civil Procedure Code the decisions in *Pita* v. *Chuni Lal*[1] and *Roshan Lal* v. *Ram Lall Mullick*[2] which follows an earlier decision in *Hari Sundari Dasye* v. *Shashi Baba Dasye* [3] are distinctly against him. This petition is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Venkatrama Aiyar ... *Appellant.* (*1st Defendant.*)*

v.

Rangasami Aiyangar and others *Respondents.* (*Plaintiffs.*)

T. P. A. S. 76 Cl. 1—Mortgagor and mortgagee—Accounts—Mesne profits, mortgagee's liability to account for after date of tender.

The provisions of S. 76 Cl. 1 making the mortgagee in possession liable to account for mesne profits after date of tender cannot be extended to cases where the mortgagor claims to split up the mortgage in consequence of the mortgagee having become the owner of a portion of the equity of redemption or to a case

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* Memo of objections in S. A. No. 53 of 1911. 17th October 1912.

1. (1906) I. L. R. 31 B. 207. 2. (1903) I. L. R. 30 C. 262.

3. (1896) 1. C. W. N. 195.

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where there are disputes between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himself, at the risk of losing the interest on money due to him and becoming accountable for mesne profits.

Second appeal from the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 62 of 1910 preferred against the decree of the Court of the District Munsif of Kumbakonam in O. S. No 215 of 1907 and the memorandum of objection filed by the 1st respondent.

T. R. Venkatrama Sastri for appellant.

K. Ramachandra Aiyar for respondent.

The mortgagor tendered $\frac{4}{5}$ of the mortgage amount to one of the mortgagees who was entitled only to so much and asked to be put in possession; but the same was refused.

K. Ramachandra Aiyar contended as regards the memo of objections that he was entitled to mesne profits ever since the date of tender, or at least from the date of plaint. He relied on S. 76 cl. (i), S. 83 T. P. Act and the observations in *Haji Abdul Rahiman* v. *Haji Noor Mahomed*[1], *Velayuda Naicker* v. *Hyder Hussain Khan*[2], *Jagath Tarini Dasi* v. *Naba Gopal Chaki*[3], *Kripa Sindhu Mukerjee* v. *Ananda Sunder Debi*[4], *Rukmini Bai Subraya* v. *Venkatesh Bab Prabhu*[5].

T. R. Venkatarama Sastri. The general principle will not apply as I would not be bound to make partition and deliver $\frac{4}{5}$ of the property.

The Court delivered the following

Judgment:—The question raised in the memo of objections is whether the plaintiff is entitled to mesne profits in the four-fifths share sought to be redeemed from the date of plaint up to the time of his being put in possession of one-half share subsequent to the decree of the District Munsif. It is argued that he is, because he tendered four-fifths of the mortgage amount to the 1st defendant and the latter refused to receive it. It is argued that the mortgage-money ceased to carry interest after the 1st defendant's refusal to accept payment and to deliver up four-fifths of the properties and that 1st defendant was bound to account for $\frac{4}{5}$ of the mesne profits from that date under S. 76, clause (i) of the Transfer of Property Act.

1. (1891) I. L. R. 16 B. 141, 149.
2. (1909) I. L. R. 33 M. 100.
3. (1907) I. L. R. 34 C. 305.
4. (1907) I. L. R. 35 C. 34 (F.B.)
5. (1907) 9 Bom. L. R. 959.

Venkatrama Aiyar v. Rangasami Aiyangar.

The claim is and cannot be rested on the ground that the plaintiff has actually sustained any damages by any wrongful act on the part of the 1st defendant. The right claimed is a statutory one. Does it exist in a case of this sort? The 1st defendant in his written statement did not deny the tender. He alleged that the plaintiff was not entitled to demand apportionment of the mortgage amount with respect to the share of the property belonging to him and to ask for partition and redemption in the same suit. He denied the plaintiff's right to get mesne profits till possession of the land was obtained. It is clear that plaintiff could not be put into possession of what he claimed without a partition. The parties were not agreed whether the plaintiff was entitled to recover one-half or four-fifths of the land. The plaintiff did not offer to pay the amount tendered and agree to leave the question of the share which he was entitled to recover to be determined by court. He had no right to require the defendant to accept the amount on the footing that his claim to recover four-fifths of the land was well-founded. The provisions of the Transfer of Property Act do not in terms refer to a case when the mortgagor claims to split up the mortgage in consequence of the mortgagee having become the owner of a portion of the equity of redemption or to a case where there are disputes between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption so as to compel the mortgagee to take upon himself the task of deciding such disputes rightly for himself at the risk of losing the interest on money due to him and becoming accountable for mesne profits. In *Searles* v. *Sadgrave*[1], it was observed: "The sum tendered must include the full amount due upon the mortgage for principal, interest and costs and the tender of such amount is not made valid by the mortgagor having a set off for the balance." A statutory right of this character should not be extended where there are disputes between the parties of the kind that existed in this case so as to throw on the mortgage an undue amount of responsibility. The claim for mesne profits must therefore be disallowed and the memo of objections dismissed with costs.

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1. (1855) 5 E. & B. 639.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar.

Sawmi Chetty ... ... *Petitioner.* *

v.

The Corporation of Madras ... ... *Respondent.*

Swami Chetti *v.* Corporation of Madras.

Madras City Municipal Act III of 1904—S. 176—Question of Law—Sch. V class III—" Dealers of every description."

The question whether a money lender comes within the expression " dealers of every description " in class III of the Vth schedule to the City Municipal Act is a question of law within the meaning of S. 176 of the Madras City Municipal Act.

Petition under S. 15 of the Charter Act praying the High Court to revise the order of the Court of the 2nd and 3rd Presidency Magistrates of George Town in Application No. 2995 of 1912.

G. S. Ramachandra Aiyar for petitioner.

P. Doraisawmi Aiyangar for respondent.

The Court made the following

ORDER.—The question whether a money-lender comes within the expression " dealers of every description " in class III of the Vth Schedule to the City Municipal Act is a question of law and the Magistrates were under S. 176 of the Act bound to have referred that question to the High Court on the application of the petitioner (who was the appellant before them).

Their order refusing to make the reference is set aside and they are directed to make the reference.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Narayana Rao and others ... ... *Appellants.*†

v.

The President of the Corporation of Madras ... *Respondent.*

Narayana Rao *v.* President, Corporation of Madras

Madras Acts—City Municipal Act III of 1904—S. 172—" Shall ordinarily be resident in "—Constitution of the Board for revision of taxation.

S. 172 of Act III of 1904 does not require that one of the commissioners hearing an application for revision of assessment should always be one who is resident in or representative of the division, in which the applicant resides or carries on business or in which the property assessed is situated.

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* Cr.R.C. No. 425 of 1912 & Cr.R.P. No. 340 of 1912. 31st October 1912.

† R. C. No. 5 of 1912. 1st November 1912.

Narayana Rao v. President, Corporation of Madras.

Cases stated under S. 176 of the Madras City Municipal Act III of 1904 by the Chief Presidency Magistrate and the Fourth Presidency Magistrate in House Tax appeals in C. C. Nos. 4053, 4054, 4570 to 4573, 5441 and 5442 of 1912.

Petitioner unrepresented.

P. Doraisami Aiyangar for respondent.

The facts which gave rise to this reference are as follows :—

Under S. 172 of the Madras City Municipal Act III of 1904 one Polur Narayana Rao and 8 others residing in Triplicane presented appeals against the decision of the President, Madras Corporation and two other Commissioners confirming the enhancement of the yearly assessments of their houses situated in Triplicane to the Chief Presidency Magistrate and the 4th Presidency Magistrate, George Town. One of the grounds of appeal in all these cases was that the orders appealed against were illegal because the Boards of Commissioners that passed them were not legally constituted as not even one of the Commissioners was a resident in or a representative of the division from which the complaint came as required by S. 172 of the Act. The Vakil for the Corporation admitted that no member resident or representative Commissioner of the Division sat on any of the Boards in question but contended that the section allows of the Boards being formed without resident or representative Commissioners when the presence of the latter cannot be secured. S. 172 provides that one of the Commissioners of the Board shall ordinarily be resident in or representative of the division in which the complainant or applicant resides or carries on business or in which the property assessed is situate. The Presidency Magistrates were of opinion that the contention of the Vakil for the Corporation would be valid if the adverb "ordinarily" qualified the words "shall be" but their view was that the word shall be read with and taken to qualify "resident" and that the plain meaning of the sentence was that every Board should necessarily comprise at least one Commissioner who 'ordinarily' resides in or is representative of the division concerned. The *raison de tre* of this the Magistrates thought was no doubt to secure to the objector the benefit of the local experience which a resident or representative Commissioner can bring to bear on the consideration of the objection and the object of the use of the word "ordinarily" seems to be to provide for cases of Commissioners who reside in their division "ordinarily" *i.e.*, during the greater part of the year but occasionally also outside them. The Magistrates held that the revision Boards were not constituted according to law, their decisions were *ultra vires* and

reversed their decision and remanded the case for disposal by duly constituted Boards.

The President of the Corporation moved the Magistrates to make a reference to the High Court on the point and hence this reference.

The Court delivered the following.

Judgment:—Although the language of S. 172 of Act III 1904 is not altogether free from ambiguity we are of opinion that the section does not require that one of the Commissioners hearing an application for revision of assessment should always be one who is resident in or representative of the division in which the applicant resides or carries on business or in which the property assessed is situated. The meaning of the section we think is that ordinarily one of the commissioners hearing the application should be resident in or representative of the division. The language of the corresponding section in the Acts of 1867, 1878, 1884, and 1892 shews that this was the intention of the Statute. No change was intended to be introduced by the change of language in the Act of 1904.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Periyathambi Gounden ... ... *Appellant** (*Plaintiff.*)

v.

Periya Gounden ... ... *Respondent.* (*Defendant.*)

Dharkast by Government—Estoppel—Fraud.

A person to whom lands were given on Dharkast by Government has a valid title to the land so given, even though he had represented originally to the defendant that he (the plaintiff) would not press his preferential claim to get the Dharkast as an adjoining owner and the defendant had on that representation spent much money in clearing the land of prickly pear before the actual termination of the Dharkast proceedings. *Secretary of State for India* v. *Bundeppa of Konakondla*[1] explained.

Second appeal from the decree of the District Court of Salem in A.S. No. 123 of 1910 preferred against the decree of the Additional District Munsif of Salem in O. S. No. 368 of 09.

T. Rangachariar and *T. M. Krishnasami Aiyar* for appellants.

T. R. Venkatarama Sastri for respondents.

The Court delivered the following.

Judgment:—The defendant in the suit applied for the grant of certain land to the Revenue officers of Government in 1903. The

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*S. A. No. 883 of 1911. 21st October 1912.

1. (1908) I. L. R. 32 M. 300.

Periya-thambi Gounden v. Periya-Gounden.

plaintiff who was an adjoining owner and who according to the dharkast rules had a preferential claim to have the land allotted to him, then stated that he did not want it. The Revenue Inspector required the defendant to clear the land of prickly pear. While enquiries for allotting the land were in progress, the defendant spent a considerable amount of money on the land. Subsequently when the dharkast enquiry was resumed, the plaintiff broke faith with the defendant and made an application for the land. Unfortunately the Revenue authorities granted it to him and ignored the claims of the defendant. The Plaintiff having got a patta from Government instituted this suit for recovery of possession from the defendant.

Both the lower Courts disallowed his claim on the ground that the plaintiff was estopped by his previous disclaimer from setting up a claim to recover the land. We are unable to uphold this view. The plaintiff at the time that he expressed his intention not to claim that the land should be allotted to him, had no right to it. His suit is based on title subsequently acquired by him by grant from Government. Government has not repudiated the grant made to the plaintiff. There is therefore in our opinion no legal answer to the plaintiff's claim for recovery of the land. An observation contained in the *Secretary of State for India* v. *Bundeppa of Konakondla*[1] has been read to us on behalf of the respondent. It is stated there (quoting from the earlier decision in *Collector of Salem* v. *Rangappa*[2]) that a person who has obtained a patta from Government would acquire a valid title in the absence of any fraud on Government or on the defendant a rival claimant. There may possibly be cases to which that proposition might be applicable. It is possible that a fraud practised on a particular party might entitle that party to oppose the plaintiff's claim to enforce his legal right. But there was no fraud in this case as found by both the lower Courts and we are not able to find any defence to the plaintiff's claim.

We must therefore reverse the decrees of the lower Courts and give the plaintiff a decree for the recovery of the land sued for. We disallow the claim for mesne profits prior to the date of suit as the claim is not pressed. The lower appellate Court will hold an enquiry as to the amount of mesne profits which the plaintiff is entitled to from the date of suit to the date of delivery of possesion and pass a final order for the amount that may be found due. The Plaintift is also entitled to costs from the defendant throughout on the value of the land.

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1. (1908) I. L. R. 32 M. 300. 2. (1889) I. L. R. 12 M. 404

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Justice Sadasiva Aiyar.

S. T. P. L. Palaniappa Chettiar ... *Appellant** (Petitioner).

v.

T. R. M. A. R. R. M. Arunachella Chettiar and other ... ... } ... *Respondents.*

Power of attorney—Construction—Power to execute decrees does not include power of assignment.

Palaniappa Chettiar *v.* Arunachella Chettiar.

Held that a power of attorney giving power to execute decrees did not authorise the transfer of decrees for a sum considerably lower than the decretal amount.

The power to realize all moneys due to the principal might include a power to receive the money due under a decree by means of a transfer of it to a third person; but it cannot include the power to transfer a decree for a sum considerably less than the amount due under the decree.

Appeal from the order of the Court of the Subordinate Judge of Tuticorin in E. P. 78 of 11 in O. S. No. 9 of 1905.

The question was about the construction of a power of attorney. The material portion of the power of attorney referred to in the judgment was as follows.

"I, the said T. R. M. A. R. R. M. Arunachellam Chettiar, do hereby, ordain, nominate, authorise, constitute, retain and appoint T. K. Aiyaviar, son of Krishna Aiyar to be my attorney from this day forward subject to the conditions of remuneration mentioned in the agreement entered into by us with our free consent and in the presence of witnesses to-day; to act for me and on my behalf and in my name or otherwise for all and such and any of the following purposes that is to say to mortgage and hypothecate my lands, houses and property in India and in the Presidency of Madras or any part thereof for any lawful purpose or as security for the repayment of any sum or sums of money now due or hereafter to become due or of any sum or sums of money to be raised and borrowed by my said attorney in my name with such interest thereon and upon such terms and conditions as he shall think fit and proper; to sign and execute all bonds, mortgages and other documents necessary or requisite in their behalf and to sell and convey and transfer and assign for any lawful purpose any of the immoveable properties belonging to myself and situate in the Presidency of Madras and to present and to admit execution of documents in any Registrar's

*A. A. O. No. 218 of 1911. 15th October 1912.

'alaniappa Chettiar v. runachella Chettiar.

office, on my behalf. I do hereby also invest my attorney with power to ask, demand, levy, or sue for, recover, receive all sum or sums of money, debts, legacies, deposits, in shops, in Courts and elsewhere goods, chattels, effects and things whatsoever now owing to, recoverable by or belonging to me or which shall or may at any time hereafter be due or belong to me and to keep them in safe custody or investment as the said attorney shall deem fit.

I do further invest the said attorney with power to give, execute and pass in my name, and on my behalf valid discharges, receipts and releases to all person or persons delivering or paying to the said attorney any property or money on my behalf and authorize him to appear for me before any court or courts of Justices in India and in all public offices; to execute all decrees in the name of my father or in any other name on my behalf or otherwise to attach and realize all monies due thereon, to prosecute and defend any suit or criminal proceeding whatever brought on my behalf or against me to sign and verify plaints, written statements and all other pleadings and applications and complaints to proceed to compromise or to admit all claim or claims as the said attorney shall think fit and prosecute all appeals and other proceedings in higher Courts in the same manner of power and authority.

I further empower the said attorney to sign, negotiate, accept, endorse and make any promissory note or negotiable instrument necessary for the occasion and to accept any process or processes which may issue from any Court or office to arrange and pay the debt already borrowed by me or in my behalf and all sums to be hereafter borrowed for the purpose of my litigation, maintenance, etc., and get a valid discharge; to compromise all disputes and differences between me and others; to refer matters to arbitration; to sign, execute and enforce any award passed thereon and to state and finally settle and adjust all accounts and demands whatsoever and receive or pay the balance or balances thereof, if any ,to the creditors.

I do further authorise and empower the said attorney to nominate and appoint one or more substitutes under him or in his place for all and any of the purpose herein beforesaid and to revoke any such appointment at his sole pleasure and discretion and pay such substitutes, such remuneration as the attorney shall think fit.

It is expressly declared that this power shall have full force and effect."

V. Viswanatha Sastry for the appellant submitted that the preamble showed that the agent was to have power to realise all properties which would include decrees, that he was expressly

authorised to "realise moneys due under decrees" that he was in addition authorised to borrow and pay off debts, to compromise claims, that under the circumstances he must be taken authorised to transfer decrees. He relied upon *Bryant* v. *La Banque* [1], conferring of certain powers would include medium powers; Bowsted page 74.

B. Sitarama Rao for the respondent submitted that powers of attorney must be strictly construed, the authority must be found within the four corners of the instrument; Story on Agency S. 68, Halsbury vol. 1, p. 161, *Bryant* v. *La Banque* [2] that recitals may be used to control the operation of the general words in the power but cannot be used to infer authority not expressly conferred. Powers that can be inferred are only medium powers *i.e.*, powers that are necessary for the carrying out of the powers expressly conferred. S. 188 Indian Contract Act; Story S. 68. The words here do not amount to conferring of the power to transfer decrees. To attach and realise moneys under decrees do not include "transfer" of decrees especially at less than their face value. On the question of construction, he cited *Murray* v. *East India Company*,[3] *Hogg* v. *Snaith*,[4] Bowstead on Agency p. 74 *Atwood* v. *Munnings*.[5]

The Court delivered the following

Judgment:—The Subordinate Judge has dismissed the assignee's application for execution in this case on the ground that Aiyavier who executed the assignment in his favour acted beyond the powers given to him under the power of attorney, Ex. A, in making the assignment. The scope of Aiyavier's agency under the power of attorney has been discussed at length at the bar and we have examined the provisions of the document carefully. We are obliged to arrive at the same conclusion as the Subordinate Judge did. Arunachella Chetti authorizes Aiyavier by Ex. A. to act for him for the purposes enumerated in the power of attorney. The enumerated powers include mortgaging and hypothecating lands, houses and property for debts due or to become due by the principal, selling immoveable properties for any lawful purpose, demanding, suing for debts and other claims, giving valid discharges, receipts and releases for payments made, negotiating, accepting, endorsing and making promissory notes and negotiable instruments: paying debts; compromising disputes and differences between the principal and other persons.

1. (1907) 6 C. L. J. 639.
2. (1893) A. C. 170 at 177.
3. (1821) 5 B. & A. 204.
4. (1808) I Taunton 347.
5. (1827) 7 B. & C. 278.

Palaniappa Chettiar v. Arunachella Chettiar.

There is a clause relating to the realization of the decrees in these terms: "to execute all decrees in the name of my father or in any other name on my behalf or otherwise to attach and realize all monies due thereon." There is no clause of a comprehensive character which would show that the principal intended to confer plenary powers on his attorney to deal with all properties and rights belonging to him. The clause relating to decrees does not in terms authorise the transfer of decrees. It is argued that it might be held to be comprised in the power to execute decrees. Execution of decrees would not according to the ordinary meaning of the expression include transferring decrees. The power to realize all monies due to the principal might be held to include a power to receive the money due under a decree by means of a transfer of it to a third person; but it would be difficult to make it include a power to transfer a decree for a sum considerably less than the amount due under the decree. No attempt was made in the Lower Court to prove that there was any compromise with the debtor which reduced the amount of the decree. A power of attorney has according to established law, to be construed strictly. Such a construction does not disable an attorney from exercising all powers incidental to the execution of powers expressly enforced on him or from exercising powers which are necessarily implied and which may be termed 'medium powers.' See Bowstead on Agency 4th Edn. p. 74, Story on Agency, S. 68. S. 188, of the Indian Contract Act lays down the same rule. It is necessary to find any power contended for within the four corners of the instrument relied on. See *Byrant Pour's and Bryant* v. *La Banque and Peuple,*[1] *Bryant Pour's and Byrant* v. *The Quebeck Bank.*[2] It is not possible to hold that the power to transfer decrees for a consideration which the attorney thinks reasonable, is incidental to any power expressly conferred under Ex. A or is necessarily required for the execution of any of such powers. The appellant stated in his petition that Aiyavier was also a partner of the principal and that the transfer of the decree by Aiyavier was within the scope of his power as partner. He also stated that the assignment of the decree was subsequently ratified by the principal, but he did not prove either of these facts. The diary of the case shows that the parties had an opportunity of adducing any evidence they had to let in. There is nothing before us to show that any evidence tendered by the appellant was rejected by the Court. The order of the Subordinate Judge must therefore be confirmed and the appeal dismissed with costs.

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1. (1893) A. C. 170. 2. (1893) A. C. 179.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Neelam Tirupatirayudu Naidu Garu and others. ... *Appellants.**

v.

Vinjamuri Lakshminarasamma ... *Respondent.*

Trust Act Ss. 15, 20, 23—Investment in unauthorized securities—Liability of trustee—Interest.

A trustee is bound to comply with the provisions of S. 20 in the investment of trust money ; and he is guilty of a breach of trust if he invests it otherwise than in accordance with the provisions of the section however well intentioned and honestly he might have acted. The measure of prudence required of a trustee by S. 15 must be regulated by any specific provisions applicable to special matters found in the other sections of the Act. Cl. 2 of S. 15 must be applied in conjunction with the other sections of the Act which regulate the cases in the measure of prudence required in particular cases.

Tirupatirayudu Naidu *v.* Lakshminarasamma.

Courts in India have not the power like the English courts to relieve the trustee from the consequences of a breach of duty in the mattter.

The trustee is liable to pay interest due on money lost owing to investment in an unauthorized manner ; and "failure to invest trust money" in cl. e of S. 23 includes "Failure to invest in an authorized manner." Even otherwise, interest is awardable as damages on the trust money lost by reason of investment in an authorized manner.

Money due to a minor is money that cannot be applied immediately or at an early date within the meaning of S. 20.

Second appeal from the decree of the District Court of Godavari at Rajamundry in A. S. No. 15 of 1908 preferred against the decree of the court of the Subordinate Judge of Cocanada in O. S. No. 7 of 1907.

T. R. Ramachandra Aiyar and *R. V. Seshagiri Rao* for appellants.

P. Somasundaram for *P. Narayanamurthi* for respondent.

The plaintiff was appointed trustee in July 1906 in supercession of the defendants who were appointed trustees under the will of one V. Appalacharlu who died in August 1900. The defendant's trustees invested the trust fund in Messrs. Arbuthnot & Co., which failed in October 1906. The plaintiff brings the suit for the recovery of damages for loss occasioned on account of breach of trust alleged to have been committed by the defendants in as much as they did not invest

*S. A. No. 1339 of 1911. 23rd October 1912.

Tirupatirayudu Naidu v. Lakshminarasamma.

the money in authorized securities. It may also be noticed that the trust fund was invested in fixed deposit at one year's notice and had not matured at the time of the failure of Messrs. Arbuthnot & Co.

T. R. Ramachandra Aiyar and *R. V. Seshagiri Rao* contended:—That the language of S. 15 of the Indian Trusts act controls S. 20 of the same act. The Trustees who have invested the moneys honestly and bona fide— Messrs. Arbuthnot & Co. were in a solvent condition in 1902 when the moneys were invested— should be exonerated from all liability even assuming there is a breach of trust. *Speight* v. *Gaunt*[1], per Jessel M. R. The trustees are only to hand over the trust property in favour of the Guardian and they have done so in their case. On the question of interest he contended that no interest should be allowed as there was no provision for interest in the Trusts Act. S. 23 explained.

P. Somasundaram for *P. Narayana Murthi* contended that S. 15 of the Trust Act does not control S. 20. The latter section imposes a statutory liability and cannot be violated. The provisions are mandatory. S. 15 speaks of the degree of diligence required to be exercised in cases of management of the trust estate. The illutrations to S. 15 support this view. The object of S. 20 is the preservation of the trust estate more than its accumulation. See *In re Cassumali Javer Bhai Pirbhai*[2]. English cases are not applicable as the language in the English Trustees Act of 1893 is "a trustee may invest" and that of the Indian Act "is bound to invest." Moreover in *Speight* v. *Gaunt*[3] their Lordships expressly make a reservation in favour of the express mandate of the testator *viz.*, that the trustees cannot infringe his instructions see cl. (j) S. 20. The degree of care to be exercised in cases of trust by trustees is well laid down in *Learoyd* v. *Whiteley*[4] see Lord Watson's judgment Lewin on Trusts p. 1146 and 1148. The trustee himself is the guardian and he cannot expend the corpus estate. See S. 41 of the Trusts Act. Lewin p. 714. On the question of interest S. 23 ill. (e) is quite clear and lays down the rule in the case of improper and hazardous investment; Lewin p. 319, 320.

The Court delivered the following

Judgment:—The question for decision in this second appeal is whether the defendants have been rightly held liable by the District Judge for the damages caused to the plaintiff in consequence of the investment of the money drawn by them from the Oriental Life Insurance Company as trustees under the will of one Appala

1. (1883) 22 Ch. D. 727.
2. (1906) 8 Bom. L. R. p. 883.
3. (1883) 9 A. C. 1 at 19.
4. (1887) 12. A. C. 727.

Tirupatirayudu Naidu v. Lakshminarasamma.

Charlu with the late Messrs. Arbuthnot & Company. In consequence of the failure of Messrs. Arbuthnot and Company most of the investment was lost and the plaintiff who was appointed by the Court as trustee in the place of the defendants seeks to recover from them the amount lost with interest. According to the provisions of the will the trustees after realising the amount of the insurance were to pay Rs. 200 to the testator's brother, Rs. 400 to his daughter for her bride's jewels and the remainder to his minor son. The first sum of Rs. 200 was paid to the brother by the trustees. The remaining amount was invested by them with Messrs. Arbuthnot and Company in 1902 on fixed deposit for a period of one year. The deposit was renewed on each occasion that it fell due before the failure of the firm. The defendants handed over the deposit receipt to the plaintiff on the 19th October 1906; but before the deposit matured again the firm failed.

Mr. T. R. Ramachandra Aiyar, the learned vakil for appellants, has argued two contentions before us. The first is that this is not a case where the trust money could not be "applied immediately or at an early date" within the meaning of section 20 of the Indian Trusts Act and that the trustees were not therefore bound to invest it on any of the securities enjoined by that section and that they were therefore bound only to act as directed by Section 15 of the Act, that is "to deal with the trust property as carefully as a man of ordinary prudence would deal with such property if it were his own." The second contention is that as they acted with ordinary prudence the provisions of the latter part of section 15 must be applied that "a trustee so dealing (that is, with ordinary prudence) is not responsible for the loss, destruction or deterioration of the trust property." The first contention cannot be upheld. With respect to the amount payable to the minor the money could not be applied for the purposes of the trust at an early date as the trustees could not pay the money until the attainment of his majority. It is impossible to hold that they could discharge themselves by payment to the minor's natural guardian who was his mother. They took the place of the guardian so far as the protection of this money was concerned and could not lawfully make payment either to the infant or to the guardian. See Perry on Trusts Vol. 2, section 624, and section 41 of the Trusts Act which expressly authorises the trustee for a minor, to "pay to the guardians, (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of the religious worship, marriage, or funeral, the whole

'irupatira-udu Naidu v. Lakshmi-arasamma.

or any part of the income to which he may be entitled in respect of such property." With respect to the sum of Rs. 400 payable to the testator's daughter the money might perhaps be regarded as capable of being applied at an early date but the trustees refused to make payment when demanded by the daughter's guardian, and having taken the responsibility of keeping money in investment for a long time they were bound to make the investment in accordance with their obligations as trustees. It is contended that section 15 of the Trusts Act lays down the paramount rule applicable to all dealings of trustees with trust property and controls all other special provisions in the Act including section 20 regulating the mode in which they should make investments, and as Messrs. Arbuthnot and Company had such a high reputation for credit and solvency that any man of ordinary prudence would consider it safe to invest his money with them there was no obligation to make the investment in one of the securities mentioned in Sec. 20. This contention it is impossibile to accept. The specific provisions contained in the other sections of the Act are as obligatory as the general provisions in Sec. 15. The measure of prudence required of a trustee by Sec. 15 must be regulated by any specific provision applicable to special matters found in the other sections of the Act. There can be no doubt that the defendants were bound to comply with the provisions of Sec. 20 and having failed to do so they must be held to have committed a breach of trust although there can be no reason to doubt that they acted honestly and with the prudence which an ordinary man would exercise in the conduct of his own affairs and that they were influenced merely by a desire to secure for the minor a higher rate of interest than could have been obtained by resorting to some of other modes of investment sanctioned by section 20. In *re Speight*; *Speight* v. *Gaunt*[1] Bacon V. C. observed " That Gaunt was full of friendly and kindly intentions towards the family of the testator I have no doubt, and that he did his best to promote their interests preceding the 24th of February I have no doubt. Most perfectly honest intentions alone regulated his conduct.........But that does not help me to the solution of this question in the slightest degree. It becomes now, after the facts I have stated, a question of law only. The law on the subject is, and has been for centuries, too clear to admit of the possibility of doubt, and neither under Lord St. Leonards' Act, nor in any of the cases in which the Court has found excuses for trustees, and on some occasions has been able to relieve them from the burden sought to be cast upon them, has the Court lost sight of the plain principle that a trustee who takes another man's money into his hands is bound,

1. (1883) 22 Ch. D. 727.

Tirupatirayudu Naidu v. Lakshminarasamma.

whatever other duties he may have to discharge, to take care that that money shall be preserved, and not to deal with it or to do anything with it which a prudent and reasonable man would not do with his own money. That is the rule which is properly to be applied to this and to all such like cases." This observation was in no way dissented from by the Court of Appeal, Jessel M. R. only objecting to the trustee being required to take greater precautions than a prudent man of business should and dissenting from Bacon V. C. only in so far as that learned Judge observed that resort to a broker for purposes of investment was not justified. In *Learoyd* v. *Whiteley*[1] Lord Watson observed: "As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may and frequently do select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So long as he acts in the honest observance of these limitations, the general rule already stated will apply."

The next question is whether the defendants can be relieved from the consequences of their breach of trust by anything which can be found in sec. 15 of the Trusts Act. Their contention is that the clause in section 15 that a trustee acting with prudence is not responsible for the loss destruction or deterioration of the trust property would permit the Court in a proper case not to award damages to the beneficiary caused by a breach of trust. This is clearly not the meaning of the section. Chapter 3 of the Trusts Act treats of the "duties and liabilities of trustees." The various duties of trustees are laid down in sections 11 to 22. Sections 23 to 30 deal with their liabilities in cases of violations of trusts. It cannot be held that the provision in section 15 exempting trustees from responsibility where they have acted with prudence is intended to exonerate them where by not acting with prudence they have committed a breach of trust. The meaning of the second clause of the section is that where a trustee has acted with prudence he could not be held to be guilty of breach of trust. But this rule must be applied in conjunction with the other sections which regulate the

1. (1887) 12 A. C. 727.

Tirupatirayudu Naidu v. Lakshminarasamma.

measure of prudence required in particular cases. Section 23 lays down in broad terms that " where the trustee commits a breach of trust, he is liable to make good the loss which the trust property or the beneficiary has thereby sustained." This statement is followed by certain exceptions to the rule. It is impossible to hold that section 23 can be controlled by interpreting section 15 in such a manner as to exempt a trustee from liability for damages on the ground that he has not acted with ordinary prudence. If this were the intention of the legislature it would undoubtedly have stated so by laying down a rule of liability far less comprehensive than that enacted in section 23. The Indian Trusts Act was closely modelled on the English law of trusts. There was no power in the English Courts to save a trustee from the consequences of his breach of trust when the Indian Act was passed. Thus Bacon V. C. felt bound to award damages against the trustee in *In re Speight,Speight* v. *Gaunt*[1] already referred to, although he held the trustee free from all blame. In England several statutes have been subsequently enacted to relieve trustees in cases where loss accrues to the estate in consequence of their acts. See sections 8 and 9 of the Trustee Act of 1893. Section 3 of the Trustee Act of 1886 gave relief to the whole extent that Mr. Ramachandra Aiyar desires that a trustee should have. It says " If it appears to the court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same." Unfortunately the Indian Courts have not been given the power to protect trustees in any case where a clear breach of trust has been committed. The ordinary principle must therefore apply, that when an injury has been caused to the beneficiary by an act done by the trustee in violation of his duty he is entitled to claim from him the damages he has sustained by his breach of trust. The District Judge's opinion that the defendants are liable for the repayment of the amount lost by the failure of Messrs. Arbuthnot and Co. must therefore be upheld.

The only remaining point is whether the award of interest by the District Judge on the amount lost is proper. The appellants rely on Sec. 23 of the Trust Act which lays down that a trustee

1. (1883) 22 Ch. D. 727.

committing a breach of trust is not liable to pay interest except in the cases mentioned therein. None of the enumerated cases would comprise this case unless it can be brought under clause (e) which applies "where the breach consists in failure to invest trust money and to accumulate the interest or dividends thereon." Where the trustee invests money in an unauthorised security this must apparently be treated as tantamount to failure to invest, for a trustee cannot be taken to have fulfilled his duty to invest unless he does so in the manner required by law. Besides, it may be doubted whether the rule disentitling the beneficiary to interest except in the cases enumerated could be applied where the trust money has been altogether lost. The Court should have power in such cases to award interest as damages. Illustration to section 23 shows that where a trustee has failed to invest trust money in the manner directed by the instrument of trust he is liable for interest although he may have made some other investment. The same principle should be applicable where the failure is in making an investment in accordance with the provisions of section 20. Illustration (b) justifies the same conclusion. The District Judge must therefore be held to be right in awarding interest also.

In C. S. No. 64 of 1909 (on the file of the High Court, Original Side) where certain trustees made an investment of trust monies with Messrs. Arbuthnot and Company, *Sankaran Nair* J. held that they were liable for the loss caused by the failure of the firm. He also directed the trustees to pay interest. But the arguments urged in the present case with respect to section 15 of the Trusts Act and with regard to the trustee's liability for interest do not appear to have been addressed to the learned Judge.

The result is that the second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Ralph Sillery Benson, Officiating Chief Justice and Mr. Justice Napier.

G. T. Gilmore ... ... *Plaintiff* (Appellant.)*

v

State of Travancore ... *Defendant* Respondent.

C. P. C. Ss. 85, 87—Suit against the state of Travancore—Jurisdiction of British Indian Courts—International law.

A suit against the state of Travancore or its Dewan for damages for wrongful dismissal is as much against the soveriegn Prince or ruling chief within the

*O. S. A. No. 27 of 1910. 18th October 1912.

Gilmore v. State of Travancore.

meaning of S. 85 C. P. C. and is not maintainable in British Indian courts without the consent of the Governor-General in council.

Appeal from the order of the Hon'ble Mr. Justice Wallis, dated 10th August 1910, in the Original Civil Jurisdiction of this court in suit No. 142 of 1910.

K. Naraina Rao for appellant.

C. P. Ramaswami Iyer for respondent.

The Court delivered the following

Judgment:—This is an appeal against the order of Wallis J. on the original side dismissing the plaintiff's suit under Rule 57 of the Original Side Rules which provides that when the plaint discloses no reasonable cause of action or is vexatious, the Judge may strike out the plaint and dismiss the suit.

The claim is to recover the sum of Rs. 94,000 from the state of Travancore or Dewan of Travancore as damages for wrongful dismissal from the service of that state.

His Highness the Maharajah of Travancore is a "Sovereign Prince or Ruling Chief" within the meaning of Secs. 85 to 87 of the Code of Civil Procedure and may not be sued in our Courts without the consent of the Governor-General in Council which admittedly has not been given in this case.

It is contended that the present suit is not against the Maharaja but against the State of Travancore or the Dewan as representing the State.

We do not think that any such distinction can be drawn.

The Code of Civil Procedure makes no provision for suits against such a state apart from its Prince or Chief, and we have not been referred to any precedent for such a suit.

We are of opinion that no such suit will lie under the Code of Civil Procedure. Apart from its provisions it is clear that under the well established rules of International Law no such suit will lie. It is only necessary to refer to the cases of *Beer Chander Manikya* v. *Raj Coomar Noboodey Chunder Deb Burnono*[1], *Strousberj* v. *Republic Costa Costa Rica*[2].

We dismiss the appeal with costs.

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1. (1883) I. L. R. 9 C. 535 2. (1880) 29 W. R. 125.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Mamabi and others ... ... *Appellants.*

v.

Acharath Parakat—Maliga purazil Cheriye Kunhifappi Haji and others ... ... *Respondents.*

Limitation Act Art. 120, 10,—Prescription—Right of Ottidar in Malabar —Knowledge, if necessary for cause of action to arise.

Mamabi *v.* Acharath Parakat.

The right of an ottidar in the West Coast for pre-emption consists in a right to elect, where there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. Such a right can only be exercised when the ottidar knows first of all that the property is sold or attempted to be sold to another person and what the terms are on which it is so proposed to be sold.

Art. 120 is the article applicable to a suit to enforce the right of pre-emption by the ottidar when the ottidar himself is in possession and there is no registered deed as required by art. 10; and the cause of action arises only from the date of the ottidar's knowledge of sale.

"In what does the ottidar's right of pre-emption consist" considered.

Second appeal from the decree of the Court of the Subordinate Judge of North Malabar in A. S. No. 346 of 09 presented against the decree of the Court of the District Munsif of Tellicherry in O. S. No. 545 of 08.

The Advocate-General (J. L. Rosario) for appellants.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

Judgment:—This appeal arises in a suit instituted by an ottidar to enforce his right of pre-emption, and the question argued before us is, whether the lower courts are right in dismissing the suit on the ground that it is barred by limitation without finding that six years had elapsed since the date the plaintiff came to know of the sale by auction. There is no finding when the plaintiff had knowledge of the auction sale. We are asked to consider whether it is enough for an ottidar who seeks to enforce his right of pre-emption to show that he has come to court before the expiry of six years from the date he came to know of the sale to a third person.

It is contended on behalf of the respondents that art. 120 of the Limitation Act does not imply that time runs from the date when the ottidar came to know of the sale, in other words, the right to sue arises

*S. A. No. 356 of 1911. 18th October 1912.

Mamabi v. Acharath Parakat.

from the date of the sale or the contract to sell, independently of when he had knowledge of such sale or contract. We may mention that there is no dispute before us that art. 120 applies to this case for it is clear that article 10 does not apply because the ottidar himself is in possession and there has been no registered instrument of sale within the meaning of that article. Article 120 is in general terms. The third column of that article lays down that the six years run from the date "when the right to sue accrues." It is argued by Mr. Seshagiri Aiyar on behalf of the respondent that we should be adding words which are not in the article if we were to hold that the right to sue arises on the plaintiff coming to know of the sale of which he complains. No doubt generally speaking Art. 120 does not make it a condition that the plaintiff should have knowledge of the facts which gave rise to the cause of action before time begins to run. But there can be no doubt and this Mr. Seshagiri Aiyar very fairly concedes that if the nature of the right imports as a necessary condition, knowledge of certain facts, then the right to sue cannot be said to arise in such a case unless the plaintiff has the necessary knowledge. The right of pre-emption which an ottidar has depends entirely on the custom which prevails in the West Coast. The materials from which the usage is to the gathered, and the nature and extent of the right of pre-emption are to be found in certain decisions of this court. The cases to which we have been referred are *Cheria Krishnan* v. *Vishnu*[1] *Vasudeva* v. *Keshavan*[2], *Kanburankutti* v. *Uthotti*[3], *Ammoti Haji* v. *Kunhayan kutti*[4], *Krishna Menon* v. *Keshavan*[5], *Ramasami Pattar* v. *Chinnan Asari*[6], *Kurri Veera Reddi* v *Kurri Bapireddi*[7] and *Kada Kamavalli Sankaran Musad* v. *Moppatt*[8]. None of these authorities directly decide the present question. Thc case of *Ramasami Pattar* v. *Chinnan Asari*[6] is hardly in point, because the right to purchase the property in preference to third persons was conferred by an express contract; and the Full Bench decision in *Kurri Veera Reddi* v. *Kurri Bapi Reddi*[7] is cited only to show that a mere contract in favour of the defendant to sell the property to him is no answer to a suit in ejectment. Here the suit is by the ottidar himself to establish his right. The other cases deal with different questions relating to the right of pre-emption possessed by an ottidar. Apart from any particular form of language that has been used in some of these cases, we think it can be fairly inferred from the

1. (1882) I. L. R. 5 M. 198.
2. (1884) I. L. R. 7 M. 309.
3. (1890) I. L. R. 13 M. 409.
4. (1892) I. L. R. 15 M. 480.
5. (1897) I. L. R. 20 M. 305.
6. (1901) I. L. R. 24 M. 449.
7. (1906) I. L. R. 29 M. 336.
8. (1909) I. L. R, 30 M. 388.

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course of decisions in this court that the right of ottidar consists in a right to elect, when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. It is obvious that such a right can only be exercised when the ottidar knows first of all that the property is sold or attempted to be sold to another person and what the terms are on which it is so proposed to be sold. If he has no knowledge of either fact he is not in a position to make any election. As it is put in some of the cases an ottidar is entitled to have an opportunity given to him to make the election to which his right of pre-emption entitles him. If this be correct apprehension of the ottidar's right we think it follows that the right to sue does not arise until the ottidar knows of the sale of the property and the terms of the sale. Both the lower Courts have dismissed the suit finding the question of limitation against the appellant, reckoning the period of limitation from the date of sale and as we have stated it is not found when the ottidar came to know of the execution sale. That is a point which must be decided, for in our opinion time would only run from the date of the ottidar's knowledge of the sale. We therefore resolve to set aside the decrees of both the Courts and remand the case to the District Munsif for disposal according to law having regard to the above remarks.

We may mention that in some of the cases *viz.*, in *Cheria Krishnan* v. *Vishnu*[1], *Vasudevan* v. *Keshavan*[2] and *Ammoti Haji* v. *Kuhayan Kutti*[3] language is used which might imply that the right of pre-emption consists in a right to have an offer made by the owner of the property to sell the property to the ottidar for the same price for which he has contracted to sell to a third person. We might have some hesitation in saying that this is an accurate definition of the nature of the right, because such a definition if strictly pursued to its logical conclusion might lead to difficulties and complications. We, however, refrain from pronouncing any definite opinion on this point as the learned Advocate-General says that if it be found that his client had knowledge of the sale more than six years before the institution of the suit he would not be prepared to contend on the facts of this case that the suit would still be within time, because no offer was made to him by the owner of the property before the auction sale.

The costs of this appeal will abide the result.

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1. (1892) I. L. R. 5 M. 198. 2. (1884) I. L R. 7 M. 309.
3. (1892) I. L. R. 15 M. 480.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present. :—Mr. Justice Ayling, and Mr. Justice Napier.

Krishna Aiyar, and others ... *Appellants.** { *6th and 7th Defendants.*

v.

Shamanna, minor legal representative of the plaintiff by his guardian Vengalaxmi Ammal and others ... ... } *Respondents.*

Hindu Law—Joint family—Contract for sale of land—Specific performance against minor member's interest—Damages—Specific Relief Act, S. 16.

Krishna Aiyar v. Shamanna.

An assent to a contract for sale of lands by a deceased co-parcener before his death cannot affect the surviving co-parcener.

A person with whom a contract for sale of family lands was entered into by only one of several co-parceners of a joint Hindu family and which could not be specifically enforced is entitled to damages against the contracting co-parcener under S. 16, Specific Relief Act.

Obiter, A managing member has power in proper circumstances to bind the minor's interest by contract for sale of family immoveable property ; and specific performance can be decreed against that interest.

Appeal from the decree of the District Court of North Arcot in Original Suit No. 47 of 1907.

Facts are set out in sufficient fullness in the judgment.

K. Srinivasa Aiyangar and *B. Sitarama Rao*, for appellant.

T. Rangachari for respondent.

K. Srinivasa Aiyangar. The suit is upon an agreement by all the defendants, the major defendants for themselves and the minor. The first objection to such a suit is that as against the minor, no specific performance can be had. *Mir. Sarwajan* v. *Fakiruddin.*[1] The principle is that the guardian cannot bind the minor by a personal covenant; *Waghela Rajasanji* v. *Shakh Masluddin*[2]; secondly there having been a higher offer before the completion of sale, the guardian is not bound to carry it. *Chitarkal* v. *Jagannath Prasad.*[3] The same principles apply even when the minor is a member of a Hindu family. *Jamsetji* v. *Kashinath*[4]. Inadequacy of price is a ground in the case of a minor to refuse specific performance. *Jamsetji* v. *Kashinath*[4]. So far as the other members are concerned the first objection is that the contract is by the 1st defendant in his own individual capacity and in respect of his own property and not as manager.

*Appeal No. 41 of 1910. 4th October 1912.

1. (1911) I. L. R. 39 C. 232. (P. C.)
2. (1882) I. L. R. 11. B. 551.
3. (1906) I. L. R. 29 A. 213.
4. (1902) I. L. R. 26 B. 326.

Krishna Aiyar v. Shamanna.

Such a contract is not binding as against the other members. *Balwant Singh* v. *Mahraja Singh.*[1] There is no presumption that the managing member seeks to execute his power. *Simbhunath Pande* v. *Golap Singh.*[2] In this case, the suit is not on that basis and no evidence is given of necessity which ought to have been done—see *Guruswamy Sastrial* v. *Ganapathia Pillai*[3], *Thakur Prosad Singh* v. *Syed Yahya Hossain*[4]. The price is so inadequate as to amount to a breach of trust. As against the other members, plaintiff cannot have specific performance on a contract by the manager; see *Kosuri Ramaraju* v. *Ivaludy Ramalingam*[5], *Srinivasa Reddi* v. *Sivarama Reddi.*[6] He can have specific performance in respect of the share of the 1st defendant for the whole money. *Subba Rani Reddi* v. *Seshachellam Chetty*[7]; *Lumley* v. *Ravenscroft*[8]. The manager's contract cannot be enforced unless having regard to the nature and the terms of the transaction, it is justified; *Hurronath Rai Chowdhri* v. *Randhir Singh*[9], *Nathmal Das* v. *Dhalip Singh.*[10] In this case, it is not the contract of the manager at all. The idea of *de facto* manager as put forward in *Mudit Narayan Singh* v. *Raulat Singh*[11]. *Krishna Aiyar* v. *Krishnasami Aiyar*[12] is that of an agent. In this case, there is no evidence of a renunciation by the *de jure* manager of his position as such even if such renunciation would confer on him the authority to bind the other members by his alienations on the analogy of *Kenath Puthen Vittil Tavashi Shuppu* v. *Narayanan.*[13] In the case of any member other than the managing member, express or implied consent by all ought to be proved *Vishnu* v. *Babaji.*[14] Even supposing that the contract was by the 1st defendant as manager, in the absence of urgent necessity, consultation of the other members was necessary. *Miller* v. *Ranganatha Mullick.*[15]

T. Rangachari submitted that the contract was with the consent of and ratified by the adult members of the family which brought the case within the exception in *Kosuri Ramaraju* v. *Ivaludy Ramalingam.*[5] The Privy Council case *Mir Sarwajan* v. *Fakhruddin*[16] has no bearing on the case of Hindu Law managers to whom *Gharibullah* v. *Khalak Singh*[17] applies.

1. (1911) I. L. R. 34 A. 296 (P. C.)
2. (1887) I. L. R. 14 C. 572.
3. (1882) I. L. R. 5. M. 337.
4. (1911) 16 C. L. J. 119.
5. (1902) I. L. R. 26 M. 74.
6. (1908) I. L. R. 32 M. 320.
7. (1909) I. L. R. 33 M. 359.
8. (1895) 1 Q. B. 689.
9. (1890) I. L. R. 18 C. 311.
10. (1911) I. L. R. 34 A. 126.
11. (1902) I. L. R. 29 C. 797.
12. (1900) I. L. R, 23 M. 597.
13. (1904) I. L. R. 28 M. 182.
14. (1908) I. L. R. 32 B. 375.
15. (1885) I. L. R. 12 C. 389.
16. (1903) I. L. R. 25 A. 407. (P.C.)
17. (1911) I. L. R. 39 C. 232.

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De facto managers can alienate, see *Mudit Narayan Singh* v. *Raulat Singh*[1] *Krishna Aiyar* v. *Krishnasami Ayyar*[2] and the authorities cited in *Mudit Narayan Singh* v. *Raulat Singh*[1]. See *Hanoomanprasad Panday's Case*[3] *Arunachella Reddi* v. *Chidambara Reddi.*[4] The last was a case where there was a legally authorised guardian. Father's attestation shows that he was a consenting party and is sufficient to cure the defect if any in the power of the 1st defendant. The Privy Council decision in *Balwant Singh's case*[5] has no application to the present. There the manager purported to act as absolute owner in denial of the rights of the other members. There is no such suggestion in this case. Evidence is admissible to show in what capacity the 1st defendant acted in this case. *Kanti Chunder Goswami* v. *Bisheswas Goswami*[6]. The only conclusion upon the evidence is that he acted as manager. If he acted as such, his discretion ought not to be too closely scrutinised *Ratnam* v. *Govindarajulu*[7]. The dissent of the other members is immaterial; *Nathaji* v. *Sitaram*[8]. It is immaterial whether a decree for specific performance is given against the other members or not. If the contract is held binding against the others, that is all what is required. The proper decree to be passed is that stated in *Subbiah Pillai* v. *Vellappa Naicker*[9]. Possession can also be decreed in such a suit; possession cannot be got in another suit *Narayana Kavirayan* v. *Kandasami Goundan*[10]. There is no difference between suits for specific performance against parties to contract and suits against strangers in this matter.

B. Sitarama Rao for appellant replied *cur ad vult.*

The Court delivered the following

Judgment:—This is an appeal from the judgment of the District Court of North Arcot in a suit for specific performance of a contract. The defendants Nos. 1 to 5 were the members of a joint family of which the 5th defendant was the father and the 1st defendant the eldest son. Defendants Nos. 6 and 7 were persons who had taken from the 5th defendant a sale of the property in question after the date of the contract sued on. The contract is dated the 27th August 1906 and by it the property was agreed to be sold for Rs. 2,375 and it was executed by the 1st defendant and witnessed by the 5th defendant. The sale to defendants

1. (1902) I. L. R. 29 C. 797.
2. (1900) I. L. R. 23 M. 597.
3. (1856) 6. M. I. A. 393.
4. (1902) 13 M. L. J. 223.
5. (1911) I. L. R. 34 A. 296.
6. (1897) I. L. R. 25 C. 585.
7. (1877) I. L. R. 2 M. 346.
8. (1902) 4 Bom. L. R. 587.
9. (1912) 22. M. L. J. 124.
10. (1898) I. L. R. 22 M. 24.

Nos. 6 and 7 of the same item of property is dated the 20th of September 1906 and was for a sum of Rs. 2,900. The District Judge has given a decree to the plaintiff directing defendants Nos. 1 to 3 and the 2nd defendant as guardian of the 4th defendant to execute a sale-deed to the plaintiff and put the plaintiff in possesion and with other reliefs has given a declaration that the sale-deed to the 6th and 7th defendants was void and ineffectual as against the plaintiff. The 5th defendant is dead. Defendants Nos. 6 and 7 appeal and their contentions are as follows:—(1) that prior to the date of the agreement in favour of the plaintiff there was an oral agreement between them and the other defendants dated the 22nd August 1906 to sell the property to them for the sum of Rs. 2,275, (2) that at the date of the sale to them there was no subsisting contract between the plaintiff and the other defendants, (3) that the plaintiff's contract is not binding on any party but himself because (*a*) the first defendant was not the managing member (*b*) even if he was *de facto* manager it was not made with the express consent of the 2nd and 3rd defendants as alleged in the plaint and the 4th defendant being a minor specific performance cannot be had against him with the result that the plaintiff could only bind the 1st defendant on his contract in which circumstances the court would not grant the specific relief sought for but would only award damages. We will take these contentions in order and see how far they are proved and are an answer to the plaintiff's claim.

We are unable to accept the evidence of the alleged oral agreement of the 22nd August 1906. Mr. K. Srinivasa Aiyangar relies chiefly on the fact that defendants Nos. 6 and 7 purchased stamp papers soon after the date of the alleged agreement and also on the fact that that agreement is recited in the sale deed. The story however is utterly improbable on the face of it. The 6th and 7th defendants allege that they were in negotiation for this property for a month prior to the alleged oral contract, that they originally having offered Rs. 2,000 and the family insisting on Rs. 2,500, at the end of the month they eventually agreed to pay Rs. 2,275, If this be so it is inconceivable that they should have subsequently paid Rs. 2,900 for the same property instead of insisting on their contract being carried out. According to their own case the negotiations for the oral contract were carried on with the 5th defendant, the father, whom they themselves alleged to be the managing member, and lastly it is unlikely that after such protracted negotiations the agreement should not have been reduced to writing. We have no doubt that the idea of this oral contract was first conceived on the 20th of September 1906 when the sale-deed was executed.

Krishna Aiyar v. Ramanna.

For the contention that there was no subsisting contract at the date of the sale reliance is sought to be placed on a discussion that is said to have taken place between the plaintiff and the defendants Nos. 1 to 5 on the 5th of September on which date he undoubtedly asked the 1st defendant to execute a sale-deed and we are asked to hold that he abandoned his right to the execution of the deed, stated that he was going away to Nellore for his father's ceremony and that he would resume negotiations when he returned, but that if he did not return shortly they could sell the property to any body else. We have examined the whole of the evidence very carefully and do not find that this contention is proved. We are satisfied that what took place with regard to the plaintiff's contract is as follows. The 1st defendant undoubtedly entered into a contract with the plaintiff on the 27th August 1906 for the sale of the lands, which contract was witnessed by the 5th defendant, but we do not believe that this was made with the express consent of defendants Nos. 2 and 3 as the evidence called for the plaintiff would have us believe. On September 5th, when the plaintiff demanded his sale-deed the 1st defendant informed him that the 2nd and 3rd defendants would not agree. The plaintiff then recognised that the agreement to sell to him was executed by the 1st defendant only and was not binding on defendants Nos. 2, 3 and 4. He did not abandon his contract but he hoped to get the consent of defendants Nos. 2 and 3 by paying a little more and left them to go to Nellore intending to make that arrangement when he returned. Mr. T. Rangachariar for the plaintiff contended that the 1st defendant was the *de facto* managing member, the father being old and ill, having resigned the management, and that even if express consent is not found there was necessity proved which makes the contract binding on the junior members, while Mr. Srinivasa Aiyangar *contra* contended that the 1st defendant did not intend to convey more than his own interest and that even if he did intend to do so the document does not purport to convey more than his own interest and lastly that necessity was neither set up in the plaint nor proved and therefore the family interest would not pass. In support of the second proposition he relies on a recent decision of the Privy Council in *Balwant Singh* v. *R. Clancy.*[1] This case however does not support his proposition. The decision did not turn on the words of the document but on the surrounding circumstances which were examined by the Court to ascertain the true intent of the document. In that case the executant was shown to have been claiming the property as the owner of an impartible *Raj* and the document itself recites this claim.

1. (1911) I. L. R. 34 A. 296.

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The case is an authority far the exactly opposite proposition that surrounding circumstances must be looked to to see whether the executant purported to convey his interest or the family interest. This was expressly decided by a Full Bench of five judges in *Kanti Chunder Goswami* v. *Bisheswar Goswami.*[1] It is true that in *Simbhu Nath Pande* v. *Golap Singh,*[2] their Lordships of the Privy Council say that a purchaser who is bargaining for the entire family estate would hardly be satisfied with a document purporting to convey only the right and interest of the father, but their Lordships used that as one test only of the intention of the parties. We cannot therefore accept the contention that this agreement purported only to convey the 1st defendant's interest. We have no doubt that when the 1st defendant executed that document he wished the plaintiff to believe that he was conveying the whole family interest in the property. But on the question of necessity we can find no evidence of pressure. What is required to justify such a sale has been laid down long ago in *Hanooman Persaud's* case,[3] "The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded". There is no evidence of the condition of this estate or of any threatened proceedings or even pressure of creditors and it further tells very strongly against the plaintiff that within a month from the date of this agreement the family was able to obtain Rs. 525 more for the same property: such an agreement on that ground alone could not in this case be upheld as being for the benefit of the estate. We therefore find that neither consent nor necessity has been made out.

The questison whether specific performance can be had against a minor of a contract made on his behalf to sell property has been argued at great length. Mr. Srinivasa Aiyangar relied on a decision of the Privy Council in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*[4] and another in *Waghela Raj Sanji* v. *Shekh Masludin*[5] and the case of *Jugul Kishori* v. *Chowdhrurani* v. *Anunda Lal Chowdhuri*[6] If this is the law it cannot be denied that it will have a very serious effect on Hindu families. There are very few joint families one member of which at least is not a minor. If therefore a specific performance cannot be had on a contract by such a family to sell property there can be no contract for the sale of land entitling the other party to specific performance. We have examined the case *Mir Surwarjan* v. *Fakhruddin Mahomed*

1. (1897) I. L. R. 25 C. 585.
2. (1887) I. L. R. 14 C. 572.
3. (1856) 6, M. I. A. 393.
4. (1911) I. L. R. 39 C. 232.
5. (1882) I. L. R. 11 B. 551.
6. (1895) I. L. R. 22 C. 545

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Chowdhuri[1] very carefully and are satisfied that that is not what their Lordships decide. The language relied on is at page 237 and it is as follows: "Their Lordships are of opinion that it is not within the competence of the guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property." The first thing that appears is that this is not a case of a contract made by a managing member purporting to bind the whole family but by the guardian of a minor and the manager of his estate. The family in that case were Muhammadans in each of whom including the minor was vested a separate though undivided share of the property, and what was considered was the power of such guardian—manager to bind the minor or his property by a contract for the purchase of immovable property. It is obvious that the question which is vital to sales by a managing member, namely, necessity, cannot arise in a contract for the purchase, not for the sale, of immoable property. The Guardians and Wards Act (VIII of 1890) section 27 expressly provides that a guardian may do all acts that are reasonable and proper for the protection and benefit of the property, but that where a guardian is appointed by the court he shall not dispose of immovable property except in the case of necessity or for an advantage to the ward and then only by permission of the court. The Act clearly contemplates such necessity arising, as of course it frequently does, and as no guardian of the property of a minor who is a member of a joint Hindu family can be appointed with reference to his share in the family property (*vide Gharibullah* v. *Khalak Singh*,[2]) it follows that the restriction in the Act cannot be applied. The decision is only an authority for the exact proposition quoted, namely, that the guardian and manager of a minor's property cannot bind him by a contract for the purchase of immovable property. The case above referred to *Gharibullah* v. *Khalak Singh*,[2] is one in which a mortgage by the *Karta* of a family and the guardian mother of a minor was considered by the court: and their Lordships held that the execution by the guardian of the minor was a nullity but that execution by the Karta, that is, the managing member bound the minor. It is true that this was a completed transfer but we can find no principle which would uphold a transfer against the minor but avoid the transaction where it had not got beyond the stage of contract. *Krishna Ayyar* v. *Krishnasami Ayyar*[3] relied on by Mr. Srinivasa Aiyangar is not an authority for that proposition. The other decision of the Privy Council, *Waghela Rajsanji* v. *Shekh Masludin*[4]

1. (1911) I. L. R. 39 C. 232.
2. (1903) I. L. R. 25 A. 407 (P. C.)
3. (1900) I. L. R. 23 M 597.
4. (1887) I. L. R. 11 B. 551.

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lays down that it will be a very improper thing to allow a guardian to make covenants in the name of his ward and that in so doing the guardian exceeded her powers with the result that a suit founded upon the personal liability of the minor must fail. This decision has no bearing whatever on the power of a managing member to bind a minor by a contract for sale of his interest for necessity. We hold therefore that a managing member has power in proper circumstances to so bind the minor's interest and specific performance can be given against that interest. In the present case, however, we are satisfied on the evidence especially with regard to Exhibit H series that the 1st defendant was not the managing member and so not entitled to bind the interest of any one but himself. The fact that the 5th defendant witnessed the agreement is of no materiality now as he is dead and his interest in the estate has disappeared. In the view that we take that the contract only binds the 1st defendant's share, Mr. Rangachariar does not ask for specific performance as to his share nor should we grant it in the circumstances of this case. He however claims damages against the 1st defendant's representative. He has not asked for damages in his plaint but we are of opinion that they can be awarded under section 16 of the Specific Relief Act and we assess the damages at the difference between the sum for which the 1st defendant agreed to sell the property (Rs. 2,375) and Rs. 2,900 which is shown by the subsequent sale deed to be the value of the property. He is also entitled to Rs. 25 expended by him in purchasing the stamp paper and Rs. 20 paid by him at the date of the agreement. Defendants Nos. 6 and 7 will have their costs throughout from the plaintiff. The plaintiff will have his costs from the 8th respondent as legal representative of the 1st defendant. The other defendants will bear their own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Justice Mr. Sadasiva Aiyar.

Moideen Kutti ... ... (*Plaintiff*) Appellant.*

v.

Koman Nair and others ... (*Defendants*) Respondents.

Moideen Kutti *v.* Koman Nair.

Limitation Act art. 39, 36—"Suit for compensation.

Trespass does not consist only in the unlawful entry on another's land and a suit for damages sustained by plaintiff in defendant's unlawfully setting fire to and destroying plaintiff's vines on plaintiff's land is governed by art. 39 of the Limitation Act and not by art. 36.

Second appeal from the decree of the Subordinate Judge of North Malabar in A. S. Nos. 458 and 474 of 1909 preferred against the decree of the court of the District Munsif of Taliparamba in O. S. No. 276 of 1908.

K. P. Govinda Menon for appellant.

V. Ryru Nambiar for respondents.

The Court delivered the following

Judgment:—This is a suit for damages sustained by the plaintiff by the defendant's unlawfully setting fire to and destroying pepper vines on his land. Both courts have found that the act assigned by the plaintiff was committed at the instigation of the 1st defendant by the 5th defendant, a tenant of his. It is contended that there is no legal evidence to support the finding of instigation by the 1st defendant. This observation is only correct in the sense that there is no direct evidence of any one who actually saw the act of instigation. There was strong circumstantial evidence against the 1st defendant and we must accept the concurrent findings of the courts below that it was proved against him. The Subordinate Judge reversing the District Munsif's decree dismissed the suit on the ground that it was barred by limitation. He applies art. 36 of the Limitation Act which provides "for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for." It is clear that article can apply only to cases of malfeasance, misfeasance and nonfeasance not provided for by other articles. The appellant contends that the case really falls within the purview of article 39 for compensation for trespass upon immoveable property. We are of opinion that his contention must be upheld. We are entirely unable to agree with Mr. Ryru Nambiar's argument that trespass consists only of unlawful entry upon another man's land. It certainly includes mischief

*S. A. No. 1489 of 1911. 18th October 1912.

Moideen Kutti v. Koman Nair.

which the trespasser commits after entering on the land. The majority of the Full Bench of the Calcutta High Court held in *Mangungha* v. *Dolhin Golab Koer*[1], that a suit for damages for cutting crops on the owner's land would come within article 39. See also *Surat Lal Mandall* v. *Umal Haji*[2]. Maclean, C.J. was inclined to hold that even if the crops cut were carried away the same article would apply. Fishing in the owner's tank without his permission was held to be trespass. *Lakhimoni* v. *Koruna Kant Moitro*[3]. Entry of the defendant's cattle and the causing of the damage thereby was regarded as trespass. *Boyle* v. *Tamlyn*[4]. *Rampini* J. no doubt held in several cases that the doing of an unlawful act by a person who has wrongfully entered on another's land would not be trespass within the meaning of article 39 but a malfeasance coming within article 36. We can only say with respect to the learned Judge's opinion that it ignores the well understood signification of trespass in law. It is unnecessary to consider whether if a trespasser carries away anything from the land a suit for damages for the loss of what is carried away would not fall within article 49. That article itself provides that a suit for compensation for injury to moveable property might be instituted within 3 years. Such a suit would not therefore fall within art. 36. It would be curious if the period of limitation for suing for compensation for injury to immoveable property should be less than that for compensation for injury to moveable property. We entertain no doubt that article 39 is the proper one to be applied in this case. Mr. Ryru Nambiar contends that the plaint does not allege that the defendants trespassed on his land. The allegation in the plaint is that the defendants set fire to his pepper vines. The plaintiff's case undoubtedly was that he did so having entered on the land for the purpose. He asked for permission in the court of first instance to make specific allegation in the plaint to that effect. Leave to amend was refused. We agree with the Court of First instance that the plaint, properly read does charge trespass against the defendants. We do not consider any amendment is necessary. With regard to the amount of damages we see no reason to differ from the award made by the District Munsif. The appeal will therefore be allowed, the Subordinate Judge's decree set aside and the Munsif's decree restored. The claim for the amount larger than that allowed by the Munsif must be disallowed. The parties will pay and receive proportionate costs in this court and in the Lower appellate court.

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1. (1897) I. L. R. 25 C. 692.
2. (1895) I. L. R. 22 C. 877.
3. (1878) I. L. R. 3 C. 509.
4. (1827) 6 B. & Cr. 329.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Koligiri Venkatramarayanier and others. ... *Appellants** (Defendants.)

v.

Patibanda Basayya. ... *Respondent* (Plaintiff.)

Limitation Act art. 29, 36, 62, 120—Suit for compensation for wrongful attachment—Cause of action when arises ?

Venkatramarayanier *v.* Basayya.

Per *Sundara Aiyar* J. (*Sadasiva Aiyar* J dissenting.) A suit for compensation for damages incurred by plaintiff by reason of his crops having been wrongfully attached and spoiled when they were under attachment through defendant's negligence is governed by art. 62 or 120 ; and the cause of action arises only from the date of the termination of the claim proceedings in plaintiff's favour.

Per *Sadasiva Aiyar* J :—Art. 29 or 36 is applicable to the case and, in either view, the cause of action arises on the date of the wrongful attachment.

Appeal from the order of the court of the Temporary Subordinate Judge of Masulipatam in A. S. No. 177 of 1911 presenting against the decree of the Court of the District Munsif of Bezwada in O. S. No. 588 of 09.

This suit relates to a claim for Rs. 596-6-0 being the value of paddy. It is alleged that the defendants in execution of their decree against one Maddali Pichamma in S. C. 897 of 05 attached the suit land and the crops thereon on 13-12-06 and that subsequently the attachment of crops alone was kept in force; that the plaintiff on his failure in claim petition, brought O. S. 521 of 07 (O. S. 259 of 09 Additional District Munsif's Court of Bezwada) for the establishment of his right to the suit land and the crops thereon that the suit was decreed in his favour ; that owing to the negligence of the defendants during the time the attachment was in force, the crops though well grown became spoiled ; that the defendants appropriated the sale proceeds of the remainder of the crops. Hence the suit.

The defendants contended that the suit was barred by limitation that there was no negligence at all on their part during the time of attachment and that the value claimed by the plaintiff was excessive. The court of first instance found that the suit was barred by limitation. The Subordinate Judge held that the suit was not barred by limitation. Hence the appeal.

*C. M. A. 54 of 1912. 7th October 1912.

Venkatramarayanier v. Basayya.

V. Ram Dass for appellants.

T. Prakasam for respondent.

The Court delivered the following

Judgment :—*Sundara Aiyar* J.:—According to the General clauses Act 1897 which was in force at the time when the land and the crops were attached standing crops would be immoveable property. It is urged for the respondent that this would make article 21 of the Indian Limitation Act not applicable. Mr. Ram Doss contends that in that case article 36 would be applicable. According to the view that I have taken in *Yellammal* v. *Ayyappa Naick* [1], the plaintiff's cause of action for the value of crops did not arise until his suit establishing his right to the land was decided on 22nd September 1909 and the suit was instituted on 22nd November 1909. I am of opinion for the reasons stated in my judgment in *Yellammal* v. *Ayyappa Naick*[1], that the proper article applicable is 62 or 120. I must hold therefore that the Subordinate Judge was right in his view that the suit was not barred by limitation. I would therefore dismiss the appeal with costs.

Sadasiva Aiyar J. If article 29 or 36 applies the cause of action arose on the 13th December 1906, the date of the attachment of the property. According to the view I have taken in *Yellammal* v. *Ayyappa Naick*[1], I would reverse the judgment of the Subordinate Judge and restore that of the Munsif.

Sundara Aiyar J. The result is that the appeal is dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[From the Court of the Judicial Commissioner of Oudh.]

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Shankar Din and others ... ... *Appellants.**

v.

Munshi Gokul Prasad and others ... ... *Respondents.*

Shankar Din v. Munshi Gokul Prasad.

Mortgage—Redemption—Subsequent arrangement qualifying right to redeem—Oudh Estates Act, S. 6.—Redemption—Onus.

There is nothing in law to prevent the parties to a mortgage from coming to any arrangement subsequent to the execution of the deed qualifying the right to redeem.

Where the mortgagors are unable to produce the deed of mortgage and the mortgagee would not produce the deed on the ground it was lost, the onus is on the mortgagors-plaintiffs to show they have a right to the decree.

1. (1912) 23 M. L. J. 519.

*1st July 1912.

Shankar Din v. Munshi Gokul Prasad.

Appeal against the Judgment and Decree of the Court of the Judicial Commissioner of Oudh, dated the 28th July 1908, which reversed a Decree made on appeal by the Court of the Subordinate Judge of Biswan on the 15th May 1907, the said Appellate Decree having affirmed a Decree made on the 12th December 1906 by the Court of the Munsif of Biswan.

DeGruyther, K. C, and *G. E. A. Ross* for appellants.

Sir Erle Richards, K. C. (*B. Dube* with him) for respondent No. 1.

Their Lordships' Judgment was delivered by:—

Mr. Ameer Ali:—The sole question for determination in this Appeal is whether the plaintiffs are entitled in this action to a decree for redemption in respect of certain property mortgaged so long ago as 1846 by their ancestor Ahlad Singh to one Daryao Singh, whom the defendants represent.

The suit was brought in the Court of the Munsif of Biswan in the Province of Oudh in respect of two villages, Pipri and Gathia. This officer dismissed the claim in respect of Gathia for failure on the part of the plaintiffs to serve sufficient notice on the Court of Wards, who held the village for one of the defendants. But he made a decree for redemption in respect of Pipri, and his decision was affirmed on the appeal of the defendants by the Subordinate Judge. On second appeal to the Court of the Judicial Commissioner of Oudh this decree has been reversed and the suit dismissed with costs. The present proceedings refer only to Pipri.

The plaintiffs have appealed to His Majesty in Council, and their main contention before this Board is that, having regard to the admitted position of the parties as mortgagors and mortgagees, the learned Judges have taken a wrong view of their relative rights.

In the view their Lordships take of the case they do not deem it necessary to set out at any length the facts on which the parties proceeded to trial. It is not disputed that in 1846 Ahlad Singh mortgaged the two villages in question to Daryao Singh and that since then the mortgagee and his representatives have been in possession. As the transaction took place ten years before the annexation of Oudh, it came within the purview of the Oudh Estates Act of 1869, section 6 of which imposed certain restrictions on the right of redemption in respect of properties held by the Talukdars on mortgage.

Shankar Din v. Munshi Gokul Prasad.

The plaintiffs were naturally unable to produce the deed of mortgage, and the defendants would not produce it on the ground that it was lost. The onus was thus cast on the plaintiffs to show that they had, in view of section 6 of the Oudh Estates Act, the right to redeem. To discharge this burden and to prove the contract as stated by them in their plaint they relied in part on certain oral evidence and in part on proceedings *inter partes* which took place in 1870 in the course of settlement disputes regarding the lands of which they were in possession under the terms of the mortgage in question. In the course of those proceedings certain *razinamahs* or deeds of compromise were entered into between the parties and filed in the Court of the Extra Assistant Commissioner who on the 17th of January 1870, made the following order. "With the consent of the parties the Court decrees the claim subject to the conditions set forth in the *razinamahs*." These documents clearly show that although the right of redemption was admitted as subsisting it was subjected to certain conditions. The plaintiffs' right to the possession of the lands and to the enjoyment of the annuity reserved to them under the deed of 1846 together with various other rights were admitted, some further lands were conceded, and then followed an important covenant which in the document executed by the plaintiffs' ancestors is in these terms :

"Should Anant singh or any of his descendants resume the under proprietary tenure, then we the executants may at first obtain a decree in respect of the said proprietary tenure

"Should they even after the decree fail to deliver possession, then we the executants and our heirs shall be at liberty to take back the villages Pipri and Gathia according to the terms of the deed executed by Ahlad singh and others in favour of Thakur Daryao Singh after compliance with the said terms.

The same covenant in almost identical language is to be found in the deed of compromise executed by the persons who then represented the mortgagee. They say as follows :—

"Whenever they convert the same into an agricultural land they should pay rent therefor. Wherefore we with our own volition do record that neither we nor our heirs shall, generation after generation, resume the under proprietary land. And in case we or our heirs resume the same, the said Madho Singh and others may by suing in Court obtain a decree.

"If we fail to deliver the land after such a decree then Madho Singh and others and their heirs shall be competent to take back, recover the villages of Pipri and Gathia after complying with the provision of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh, our deceased father."

In their Lordships' judgment the arrangement arrived at in 1870 is conclusive as regards the present action. Whatever may have been the mortgagor's right under the deed of 1846, the parties deliberately came to a settlement in 1870 by which his representatives for

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certain additional benefit reserved to them under the *razinamahs*, agreed to subject their right of redemption to certain conditions. There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem. In the present case it is not alleged that the action is brought upon a breach of the covenant contained in the deed of compromise. Their Lordships are therefore of opinion that the suit was rightly dismissed by the Judicial Commissioner, and they will humbly advise His Majesty to dismiss this Appeal with costs.

Solicitons for Appellants :—*Messrs. T. L. Wilson & co.*

Solicitors for Respondents :—*Messrs. Barrow Rogers* and *Nevill.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Mulpuru Lakshmayya, and others. *Appellants.* (*Defendants*).*

v.

Sir Rajah Varadaraja Apparow Bahadur Zamindar Garu. ... ... } ... *Respondent.* (*Plaintiff*).

Land Tenure—"Savaram lands"—meaning of—Madras Estates Land Act S. 185—Leases before July 1898 and after July 1898—Admissibility in Evidence—Judge's knowledge—Extent of user in decision of case.

Lakshmayya v. Rajah Varadaraja Appa Row.

Per *Sundara Aiyar* J. :—The words "savaram lands" do not necessarily import the absence of Kudivaram right in the cultivating ryot i.e. the idea of full proprietary right in the Zemindar.

Under S. 185 of the Estates Land Act, leases *executed* before 1st July 1898 can be taken into consideration in coming to a conclusion as to whether certain lands formed part of the Zemindar's private land or not. It is the date of the contract and not the period of the lease which determines the admissibility. Leases executed after 1st July 1898 are inadmissible in evidence to prove the character of the land except to prove that lands leased before July 1898 by the Zemindar were treated in the same manner after that date.

A judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise ; but he may use and cannot help using his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in the case.

Per *Sadasiva Aiyar* J. The word "Savaram" when applied to lands indicate usually that the land itself, both Melwaram and Kudivaram, belongs to the Zemindar free from any obligation to pay revenue to Government on the extent of such land. The court *may* presume that Savaram land is the private land of the Zemindar, but it cannot be laid down that the courts *shall* always make the presumption.

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* S. A. Nos. 575 to 579 and 581 to 586 of 1911 and S. A. No. 575 of 1911.
27th September 1912.

Lakshmayya v. Rajah Varadaraja Appa Row.

Under S. 185 of the Madras Estates Land Act leases granted before 1st July 1898 are admissible in proof of the character of the land, even though the period of lease be subsequent to 1st July 1898; and leases after 1st July 1898 are totally inadmissible, *i.e.* not admissible even to show that a land was treated in the same manner after July 1898 as before July 1898.

The only restriction which can be imposed upon a Judge in the matter of using his personal knowledge in the decision of a case is that he should not import knowledge obtained by mere rumour or hearsay of concrete facts connected with the particular case before him for arriving at a conclusion.

The limits as to the use by the Judge of particular facts known to him in connection with the case before him and the restrictions under which he may use his knowledge in the decision of the case discussed.

Second appeals from the decrees of the District Court of Kistna at Masulipatam in A. S. Nos. 149 to 153, 155, 156, 158,159 161 and 162 of 1910 presented against the decrees of the Court of the District Munsif of Gudivada in O. S. Nos. 268, 269, 272, 275, 367, 370 and 371 of 1908, 373 of 1908, 209 of 1909, 377 of 1908, and 210 of 1909, respectively.

T. V. Sheshagiri Aiyar for appellant.

L. A Govindaraghava Aiyar for respondent.

T. V. Sheshagiri Aiyar relied upon, Wilson's Glossary, Baden Powell, Maclean's Manual Vol. III, Grant p. 155 for the definition of the word. He submitted that the judge erred in importing his own knowledge into the case and cited *Durga Prasad Singh* v. *Ram Doyal Chaudhuri* [1], *Hurpurshad* v. *Sheo Dyal* [2], and Best on Evidence p. 25. He submitted that admissions contained in documents after 1898 could not be used even as admissions. He relied upon *Masudan Singh* v. *Goodar Nath Pandey*[3], *Nilmonichukkerbetti* v. *Bykant Nath Bera*[4], *Cheekati Zemindar* v. *Ramsoorn Dhora.*[5]

L. A. Govindaraghava Aiyar submitted that it was competent for the judge to weigh the evidence with reference to his own experience and knowledge of things and that the admissions were evidence.

The Court delivered the following

Judgment:—*Sundara Aiyar J.* These are appeals by ryots in the village of Manikonda in the proprietary estate of Gannavaram against whom decrees of ejectment were passed by the District Court of Kistna reversing the decrees of the District Munsiff of Gudivada who held that the ryots possessed occupancy right in their lands and could not be ejected. The lands in question were asserted by

1. (1910) I. L. R. 38 C. 153.
2. (1909) I. L. R. 31 A. 285
3. (1905) 1 C. L. J. 456.
4. (1890) I L. R. 17 C. 466.
5. (1899) I. L. R. 23 M. 318 at. 326.

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the proprietor to be his private lands in which both the Melvaram and Kudivaram rights were vested in him. He alleged that both by custom and contract he was the full proprietor and that the tenants had no occupancy rights. The defendants on the other hand, asserted that they were part of the public lands of the estate held by the ryots with occupancy rights. They were undoubtedly known as *Savaram* lands and were described as such in the pattas, muchilikas and leases executed between the parties. The plaintiff contended that the word 'Savaram' itself indicated his full proprietary right in the land. The District Munsiff denied this but the District Judge accepted the interpretation claimed for the plaintiff. We are of opinion that on this point the District Munsiff was right in holding that the word did not necessarily import the absence of kudivaram right in the cultivating ryot. Wilson's and Wilkins' glossaries cited by the District Judge are both opposed to the interpretation accepted by him. Both these learned writers define Savaram as an allotment of *land or of the Government revenue derivable from it held* by Zemindars or other Revenue Officers under the Muhammadan Government as personal compensation for services rendered by them. Mr. Grant, the author of the Survey of the Northern Circars, no doubt describes it as a grant of land. See pages 7 and 155 of Vol. II of the Fifth report of the Parliamentary Committee. The word is supposed to have the same meaning as 'Nankaron' Bengal. The latter wordis defined by Baden Powell as a 'money allowance'(or free land). In Maclean's Manual of Administration 1893, 'Savaram' is treated as a grant of land. All that is clear, however, is that Savaram was compensation granted to a Zemindar or Revenue Officer under the Muhammadan Government. Sometimes the Zemindar was a descendant of a royal family that enjoyed demesne or private lands and remained in possession of them after the family ceased to exercise sovereign powers, but continued to have Zemindari rights under the Muhammadan rulers. The holder was allowed to retain these private lands as compensation for services rendered by him to the state and partly also in consideration of his being responsible for the collection and payment of the state revenue. The private land in his own occupation was itself exempt from the payment of any revenue. But the Zemindar was sometimes a mere renter under Government holding his office at its pleasure. In such cases some land was sometimes granted to him and exempted from the payment of any revenue. But if no land was available the grant to the Zemindar would consist merely of the revenue on a portion of the lands for the assessment of which the Zemindar was responsible to the State. This is the view taken both by Wilson and Wilkins. The materials avail-

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able for the interpretation of the word do not justify the judge's view that Savaram necessarily conveys the idea of full proprietary right in the Zemindar. In second appeals 994 to 1024 of 1902 relating to the same estate certain Savaram lands were held not to be the Zemindar's private property. In second appeals 518 and 519 of 1910 also which came up from the same District 'Savaram' lands were held not to be the same as private lands. Mr. Seshagiri Aiyar, the learned vakil for the appellants, contends that the finding of the District Judge against his clients is completely vitiated by the judge's interpretation of the word 'Savaram.' This argument is not without foundation. The judge observes "starting then with this finding (*i.e.*, that savaram was the actual grant of land and not of land revenue) we have to see whether the lands claimed now as Savaram by the appellants were the original lands granted to him by the original sovereign or were so accepted by the permanent settlement or have so long been treated as savaram as to justify their acceptance as original savaram." There was, however, no serious dispute between the parties before the District Munsif that the lands in question were designated as 'Savaram' in the documents relating to them. In appeal an attempt was made to show that in two cases, lands not originally described as Savaram in the Zemindar's accounts were so designated in the accounts or subsequent years. But these variations were found by the District Judge to be easily explicable. The judgment of the appellate court shows clearly to our minds that the Judge did not fail to address himself to the real question between the parties *viz.*, whether the evidence was sufficient to establish that the Zemindar was the owner of both the melvaram and the kudivaram in the lands. The discussion is not directed to the point whether the lands in this suit were proved to be Savaram in ancient times or at the time of the permanent settlement. The judge first shows that Savaram lands were treated in the accounts of the estate as different from the Seri or public cultivable lands, that they were held by the ryots on rates of rent different from the seri-lands and that Government by collecting water rates on Savaram lands from the Zemindar, while it levied it from the ryots in the case of Seri lands apparently treated the former as belonging to the Zemindar. He then refers to evidence showing that from the year 1892 the Zemindar asserted and the ryots admitted that the full proprietary right in the lands belonged to the former. He finds that in 1896 and 1897 the Zemindar let these lands definitely as his own private lands and that in 1898 and subsequently he substituted grain rents for money rents and put up the lands for auction to the ryots who offered the highest bids of rent. These are points directly

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relating to the question whether the kudivaram right belongs to the Zemindar or to the ryots and have no bearing on the identity of the lands with these belonging to the Zemindar as Savaram in olden times. In summing up his conclusions the judge observes that the plaintiff has proved the lands to be private. We are therefore of opinion that the lower appellate court's incorrect interpretation of the word Savaram does not affect the validity of the finding that the lands in question are the Zemindar's private lands.

Another objection taken to the finding is that the pattas of the year 1897 in which the lands were let as the private lands of the Zemindar ought not to have been taken into consideration inasmuch as the leases evidenced by them were to operate from 1st July 1898, the beginning of the fasli year 1308. The argument is based on section 185 of the Estates Land Act which enacts that "when in any suit or proceeding it becomes necessary to decide whether any land is the landlord's private land, regard shall be had to local custom and to the question whether the land was before the 1st day of July 1898 specifically let as private land and to any other evidence that may be produced; but the land shall be presumed to be private land until the contrary is shown." We cannot accept this contention. The letting took place before 1st July 1898 although the period of the lease commenced only subsequently. It is the date of the contract that is material in deciding whether the evidence is admissible. The legislature wished to make all contracts made from and after the 1st July 1898 inadmissible against the ryot on the ground that proprietors had been making attempts to convert public lands into their own private lands for sometime before the Act was passed. Suppose a Zemindar made a lease in 1895 for a period of 3 years and at same time gave a lease to another person to come into operation on the expiration of the previous lease, it would be impossible to hold that the letting to the second lessee was after the 1st July 1898. Such an interpretation is not required either by the words or the mischief of the statute, *Nilmoni Chuckerbutti* v *Bykant Nath Bera*[1]. Mr. Govindaraghava Aiyar for the respondent asks us to hold that leases granted after 1st July 1898 are not shut out by the section and that it only provides affirmatively that leases prior to that date should be taken into account. This is hardly consistent with the object of the section nor is it easy to see why there should be any provision to making a letting before 1st July 1898 admissible if leases both before and after that date were regarded as equally admissible. The appellants also contend that subsequent dealings after

1. (1890) I. L. R. 17 C. 466.

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1st July 1898 ought not to have been taken into consideration by the judge for any purpose. But he was certainly entitled to take them into account for deciding whether they had not been held as private lands by the Zemindar for a period of 12 years prior to the commencement of the act. Moreover it cannot be held that when a Zemindar has proved that he let certain land as private land before 1st July 1898, subsequent letting of the land in the same character cannot be proved to show that it was treated in the same manner after July 1898 as in the letting previous to July 1898. The act does not lay down any rule as to all the kinds of evidence that may be produced to prove that the land in question is private land, and it connot be held that all evidence subsequent to 1st July 1898 is shut out altogether. See *Akhju Singh* v. *Jagannath Prasad Singh*[1]

The third objection to the finding of the appellate court is that the Judge's opinion that the khats of 1896 which contained a statement that the tenants had no occupancy right were not executed by the ryots with a knowledge of the contents of the documents was based by him on his own personal knowledge and that he acted illegally in importing his own private knowledge in deciding the question whether the plaintiffs' witnesses who stated that the ryots had a talk over the terms of the khat and raised no objection to them or the defendant's witnesses who denied all knowledge on the part of the ryots of the terms, should be believed. There is no doubt that a judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise. See *Hurpurshad* v. *Sheo Dyal*[2] and the cases cited in Amir Ali and Woodroffe on Evidence at pages 115 and 806. But at the same time it is quite clear that a judge may use and cannot help using his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in dispute in the case. See Thayer's cases on Evidence page 10 and Best on Evidence page 176 section 187 where it is observed, "but here an important distinction must be borne in mind *viz.*, the difference between general information and particular personal knowledge." Wigmore in his treatise on Evidence says (see section 2570 Vol. iv) that "a jurior is entitled to use his knowledge of the conditions affecting various kinds of values (of land)" The date on which legal inference is based are not all proved by evidence. Very often, though not always, what may be said to be of the nature of a major permise has not got to be proved. The Judge is entitled to act upon his own knowledge of

1. (1911) 13 I. C. 1. 2. (1909) I. L. R. 31 A. 259 at p. 285.

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the conditions of society including the history of its economical progress. It is not necessary to prove that population has increased and that there is great demand for land on the part of the cultivators now in parts of the country while in former times land was plentiful and cultivators were scarce. The dividing line is not easy to fix in all cases. What the judge has done in this case is to use knowledge gained by him from his own experience that in 1896 there was no such scarcity of land for cultivation as to induce ryots to sign any muchilika that they might be required to execute. That is merely a fact of economical history. The judge has not used his own knowledge as to the conduct either of the particular Zemindar or of his ryots or the relations between them in any particular case or to fix the exact time at-which any particular change commenced. He does not use his knowledge of the character of any particular individual which is necessarily of a variable kind (See Wigmore section 2570 vol. IV). No doubt the private knowledge used by the Judge related to lands in the Nuzvid Zemindari. But that is really an extensive tract of territory and the judge did not import into the the judgment any knowledge of the village in question or even specifically relating to the Gannavaram estate in the Nuzvid Zemindari. We do not think that the judge overstepped the boundary line in this case. The onus was on the ryots to prove that they had no knowledge of the contents of the khats which they executed; and the judge was entitled to disbelieve evidence of facts which *prima facie* required strong proof. *Durgaprasad Singh* v. *Ram Doyal Chaudhuri*[1], does not really help Mr. Seshagiri Aiyar. There the judge was using his knowledge of a fact of a specific character *viz.*, that landlords were deliberately inducing ignorant ryots to sign documents describing themselves as temporary lessees, Ticadars or Ijaradars. The question whether pressure was used in that case undoubtedly required to be proved by evidence relating to the execution of the particular document. In *Hurpurshad* v. *Sheo Dyal*[2] the Privy Council merely held that a judge cannot use his knowledge of the character of a particular witness in deciding as to his credibility.

The objections taken to the finding of the District Judge on the question whether the Zemindar is entitled to both the varams in the lands must therefore be held to be untenable and the second appeals must be dismissed with costs.

Sadasiva Aiyar, J:—The facts of the case have been fully set out in the judgment just now delivered by my learned brother and I need not repeat them. As two of the questions involved in the case

1. (1910) I. L. R. 38 C. 153.

2. (1909) I. L. R. 31 A. 259.

are of some importance, I think it is not inappropriate to add a judgment of my own. As regards the meaning of the word Savaram, this word like Seri, Jeroyati and similar words seem to have different meanings in different parts of the country, but so far as this Presidency is concerned the opinion of Mr. Grant, Dr. Maclean, Baden-Powell and of Sir G. S. Forbes seems to be that the word 'Savaram' when applied to a land in a *Zemindari* tract indicates usually that the land itself, both melvaram and kudivaram, belongs to the *Zemindar* free from any obligation to pay revenue to Government on the extent of such land. I do not say that in consequence of a land being known as Savaram it *should* be presumed to belong (both melwaram and kudivaram) to the *Zemindar* but I think that courts *may* presume such land to be of the above character. The learned District Judge in this case seems to have put the presumption rather too strongly but otherwise his judgment which has gone very carefully into the evidence seems to be not open to criticism.

As regards the other important question as to how far a judge could use his own knowledge when arriving at a conclusion on the evidence adduced before him, the authorities are by no means clear. In the case in *Hurpurshad* v. *Sheo Dyal*[1] the judge in the lower Court imported into the case his own knowledge of the fact that the family of the parties had recognised the division which one Chandan had made prior to his demise though there was no evidence let in about such recognition by the family. Their Lordships of the Privy Council held that this ought not to be done as the judge's knowledge *might have depended on mere rumour or hearsay.* Their Lordships in the next sentence (page 286) state " But even if the commissioner's statement of facts from his own knowledge be taken as evidence "—this shows that their Lordships did not finally decide that if the judge's knowledge *was not based upon mere rumour or hearsay* but was the impression made directly on his own senses and if such knowledge had been communicated to the parties for criticism and comment, such knowledge could not be used by him in arriving at a conclusion on the evidence before him. In *Lakmidas Khusal* v. *Bhaiji Khushel*[2] a Subordinate Judge decided the suit after local inspection in which he found that a passage for rain water spoken to by the plaintiff's witnesses as existing did not really exist. It was contended before the High Court that the Subordinate Judge acted illegally in importing his knowledge obtained at the local inspection in deciding the case and the appellant's vakil relied on the oft-quoted and as often mis-understood case of

1. (1909) I. L. R. 3 I. A. 259. 2. (1911) I. L. R. 35 B. 317.

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Kessowji Issur v. *G. I. P. Ry. Co.*[3] But one of the learned Judges (Chandavarkar J.) easily distinguished that case on the ground that all that the privy Council decided was that the learned High Court Judge's personal knowledge obtained on an inspection of the locality on a different day amidst possibly different surroundings was no safe criterion in deciding the question in issue in that particular case. The learned Judge (Chandavarkar J.) in *Lakmidas Khusal* v. *Bhaiji Khusal*[4] clearly held that the Subordinate Judge did not act illegally in using his knowledge of the non-existence of the rain-water-passage in deciding the case before him. In *Bourne* v. *Swan Edgar, Ltd.*[5] Farwell J. said that two classes of cases must be distinguished in these matters and while in one class of cases the Judge's direct knowledge can be used only for the purposes of enabling him to understand the questions that are being raised, to follow the evidence and to apply the evidence there are cases of a different kind where it is the eyesight of the Judge that is practically the ultimate test. In cases of infringement of patent rights or infringement of trade-marks and in cases of 'passing off' the defendant's goods as plaintiff's, the Judge has mostly to rely upon the evidence of his own senses. As regards the demeanour of witnesses, the Judge has to depend upon the knowledge and the impression brought to his mind by his eyes and ears. Even as regards the credibility of witnesses, let us suppose that a person known to the Judge as of the highest character is produced as a witness before the Judge. Is it possible for him to put out of his mind his knowledge of the character of the witness in coming to a conclusion upon the evidence? It is simply asking the Judge to perform an impossible feat. As to using the observations made by the Judge at a local inspection merely to understand the evidence, I shall here quote the remarks of Bissel J. in an American case. "We are very frank to say we do not appreciate the refined distinction which is drawn by some authorities wherein it is held that the jury are not at liberty to regard what they have seen as evidence in the case but must utterly reject it otherwise than as an aid to the understanding of the testimony offered. The folly of it is apparent from the constitution of the human mind and the well-known processes by which juries arrive at conclusions. If a dozen witnesses should testify that there was no window on the north side of the house from which one had sworn that he had viewed the affray and the jurors on view should see the window, all lawyers would know that it would be futile on the argument to insist on the jury that their verdict must be based on the non-existence of the window since the point had been

3. (1907) I. L. R. 31 B. 381. 4. (1911) I. L. R. 35 B. 317.
5. (1903) 1. Ch. D. at p. 225.

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sustained by a vast preponderance in the number of witnesses" (11 Colo. App. 41). I know that there are old dicta to the effect that a Judge should decide only on the evidence before him and should not at all use his private knowledge. Wigmore refers (para. 2569 note 2) to a case in Henry IV's time where the Judge allowed a prisoner to be convicted on the evidence but got a pardon for him from the King because the Judge knew of his personal knowledge that the accused was not guilty. This shows the absurd lengths to which the doctrine of not using personal knowledge in coming to a conclusion in the case could be carried and why it is that there is agitation now in this country for village panchayets to be constituted as Judges so that they might use their own knowledge of the facts of the case and the character of witnesses to come to conclusions on facts. I do not of course wish to restore the days of Mariada Raman or Haronalraschid but a Judge must be allowed to use even his knowledge of concrete private facts, provided he mentions his knowledge to the parties and they do not object to his deciding the case and he must be allowed of course to use his knowledge of general or public facts, historical, scientific, political and otherwise in coming to his conclusions. Let us take the case of a witness who belongs to a hill tribe which is known to the Judge by his past experience as a Revenue Officer as consisting of persons who are generally incapable of telling complicated lies, is not the Judge entitled to use his said knowledge in arriving at a conclusion on the evidence of that witness? Judges and Juries do use and, it seems to me, are entitled to use their general past experience of men and things in arriving at conclusions of fact and such experience is not only not considered as a disqualification but is a very necessary qualification for coming to sound conclusions of fact. I know that English Judges have laid down in some cases the rule as to the using of the Judge's own knowledge in coming to conclusions upon the evidence rather too strictly: (see *London Omnibus Company Ltd* v. *Lavell*[1]) but with great respect, I am inclined to think that the only restriction which can be imposed upon the Judge is that he should not import knowledge obtained by mere rumour or hearsay of concrete facts connected with that particular case before him for arriving at a conclusion. When a Judge is supposed to be reliable enough to come to a conclusion on the evidence of facts deposed to before him as seen or heard by witnesses, it is surely anomalous and even startling to hold that he cannot be relied on to use impartially the facts directly seen and heard by himself. The only result of thus holding would be that Judges would be induced to take some formal evidence of the same

1. (1901) 1 Ch. D. 135.

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facts from much less reliable sources than themselves and to omit all mention of their own knowledge in their Judgments and this course cannot be held as conducive to a satisfactory decision of the cases when they come up on appeal before the appellate Court.

When a proposition of fact has to be established before a judicial tribunal, there are two principal heads under which the modes of presentation of the evidentiary facts fall. "The first is by the presentation of the thing itself as to which persuasion is desired" (Wigmore section 24) and this mode is called Immediate or direct real evidence (*Pratyaksha Pramana*). In case of contempt of Court, committed in the presence of a tribunal "it has direct real evidence of the fact." "The thing which is the source of the evidence is Present to the senses of the tribunal." The first and best mode of proof (called *Pratyaksha* in Sanskrit) is sometimes rather pedantically called 'Autoptic preference' in English. When a Judge sees the demeanour of a witness or observes that a witness is blind or deaf or a prosecutrix who complains of rape is a brazen muscular woman or that an accused charged with running away from custody is a lame man it is surely open to him to use such direct knowledge in coming to his conclusions as to the rights and wrongs of the parties before him without having these facts proved by the statements of others as witnesses. The second principal head of proof (Inference or *Anummana*) falls under two sub-heads *viz.*, (*a*) the evidence given by a human being heard or read by the tribunal and called testimonial or direct evidence and (*b*) other connected facts called circumstantial or indirect evidence (see Starkie 1-13).

When a tribunal knows a fact by direct real evidence, that fact is necessarily established much more satisfactorily than by the other kinds of evidence. It may be necessary to provide that when a fact is known to the Judge in this way, he should make a note of it in writing during the course of the trial and read it out to the parties so that the parties might be aware that the Court has knowledge of that fact and so that arguments and comments might be based and explanations offered by both sides on such fact so stated by the Judge as known to him before the Judge decides on the rights and liabilities of the parties. This is the principle of the rule enunciated in some Indian cases, that the Judge who has made a local inspection should place on record the evidence and impressions gathered by him (See *Raikishori Ghose* v. *Kumudinikanta Ghose*)[1]. In England and America juries are mostly the Judges of fact and the jury are presumed not to be able to arrive at proper conclusions without a

1. (1910) 15 C. L. J. 138.

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pretty exhaustive summing up of the evidence by the Judge. Further, if one of the jurors has previous private knowledge of a fact, the others might not know it. Hence there is the rule that that juror must testify as witness in the case though his said private knowledge and his having testified as a witness do not make him incompetent to sit on the jury as one of the Judges of facts, as his knowledge after he gives his evidence is commented upon by the Judge in his summing up. The system of trial by juries who are returned "of the Vicinage whence the cause of action ariseth" was originally based on the circumstance that "the law supposeth them hence to have sufficient knowledge to try the matter in issue though no evidence were given on either side in Court." If such evidence of witnesses is given, the jury "may have evidence from thir own personal knowledge by which they may be assured and sometimes are that what is deposed in Court is absolutely false" and "the jury may know the witnesses to be stigmatized and infamous" (Vaughan C. J. in Bushell's case 1670). But between 1650 and 1700 "the necessity of controlling the jury in some further way under the changed" and changing conditions of society was felt and hence, the Judges who were guided by such motives gradually laid down a new rule. From 1702 the new rule has been established that a juror should give evidence and be subjected to the test of cross-examination before he could use the facts in his own direct knowledge and communicate them to his fellow-jurors, if those facts are not 'notorious' or 'unquestioned' facts or facts deducible from the common fund of experience and knowledge of which anybody could reasonably take 'notice' without proof and are not "matters of mere private interest."

If a Judge has knowledge of some particular concrete fact which is a matter of mere 'private interest' peculiar to the particular case before him which fact is not an existing natural fact (of relative permanence like the existence of a stream or a tree) but one that has already happened and which fact is a matter of strong controversy between the parties, he should no doubt retire from the case as Judge so as to be able to give his evidence for one side or the other before another Judge. But where a Judge has no personal or pecuniary interest in a case and merely uses his knowledge of human nature or his general opinion of large classes of people based on his previous experience or the testimony of his own senses in respect of things and persons observed by him in the course of the proceedings before him after he had given notice to the parties (or even outside the proceedings, provided he mentions such knowledge to the parties), I do not see how he could be prevented (except by asking him to do the impossible feat of forgetting everything and even not to be

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led sub-consciously by facts within his knowledge) from using such knowledge. I cannot even bring myself to understand why he should be so prevented, especially if he has special technical learning, knowledge and general information which gives him very useful materials for arriving at a proper conclusion. A judge is appointed presumably for the reason that his learning, impartiality and trained powers of observation are superior to and more reliable than the average learning etc., of the litigants and witnessess before him. In systems of law where the Judge has very little to do with findings on facts; a judge might be made merely to sum up the evidence before him impartially (without asking the jury to consider what he knows) and leave it to the jury to come to their own conclusions. But where (as in India in all civil cases and most criminal cases) the judge is a Judge of both facts and law, it is impossible to ask him not to use his knowledge of particular classes of people, and other like circumstances when arriving at a conclusion on facts. Of course if an appellate Court finds that a lower Court has unduly pressed such general knowledge (say, by unduly suspecting the genuineness of an unregistered document because it was executed in a town notorious for forgeries or because the writer was of a particular caste or profession), the appellate tribunal would use its own presumably sounder knowledge of human nature to set right the inferior court and give advice to the lower Court not to be led too much away by such considerations. It has been sometimes laid down that a judge must as Judge "ignore what he knows as a private man" and he "may have to ignore" as a private man what he knows as Judge. I respectfully dissent from such observations. In some old cases (collected in foot note 4 in Wigmore para. 2569), it was held that the Judge's personal knowledge of a witness's lack of credit should not be used. In a later case however the trial Judge's "great familiarity with that portion of the state" was considered as a ground for not reversing his judgment and a Judge's personal knowledge of the services of a counsel (obtained as Judge sitting in the previous case) was allowed to be used by the Judge in fixing the remuneration of that counsel in an action brought by the counsel for such services. I think the only practical rule which can be laid down in these cases is that if a Judge knows of his own knowledge as an individual observer of a past relevant concrete private incident and that fact cannot be subjected to ocular proof at the time of trial (such as a person's colour, resemblance of features, appearance, behaviour, chemical experiments on the present condition of the object) and if the truth of such incident is contested between the parties, he should mention his private knowledge of such incident to the parties and he

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should refuse to be the Judge in that case, unless both the parties after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge. That the Judge was competent to give evidence in the witness-box and to subject himself to cross-examination and then to decide the case was the old rule but this has been discountenanced for obvious reasons in modern times and, in my opinion, should not be allowed. All that can be permitted is that the Judge's personal knowledge should (as in cases of proceedings for contempt) be recorded and be allowed to be commented upon in a moderate manner. In the case of concrete particular facts, the Judge who uses his own knowledge should only be obliged to state whether he knows it by direct knowledge or by rumour or hearsay and should not be subjected to cross-examination. General knowledge of the tenures in a particular area or of the character of certain populations as also direct knowledge gained by his own senses and mind—it is impossible to prohibit the Judge from using such knowledge in drawing inference from the evidence before him and in coming to conclusions as to the rights of parties before him. In the present case, the learned Judge has not gone further than using the general knowledge which he had acquired as a past revenue officer and as a revenue Court of experience in the course of the performance of his duties in Zemindari tracts; and I hold that he was entitled to use such knowledge in coming to a conclusion on the facts after the consideration of the evidence let in this case. One other short point has to be noticed, *viz.*, whether evidence as to leases granted after 1st July 1898 are wholly shut out as evidence by section 185 of the Estates Land Act. I am inclined to hold that they are so shut out if sought to be used for the purpose of proving the character of the tenure of the land and even if such leases are sought to be proved merely in order to show that a land was treated in the same manner after July 1898 as before July 1898. I agree however, with my learned brother that leases granted before 1st July 1898, though they were to come into force only after 1st July 1898 are admissible in evidence and in the result, I agree that these second appeals should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS,

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Vembu Iyer *alias* Ramanadha Iyer... *Plaintiff* (Appellant.)*

v

Srinivasa Iyengar and others ...*Defendants*(Respondents)

Hindu Law—Guardian and Ward—Natural guardian—Powers of—Alienation—Necessity—Pressure—Test—Discretion of guardian—Payment of debts binding on the estate—Sale and Mortgage—No difference—Costs—Practice—Difficult questions of law involved.

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Per Sundara Aiyar J:—The duties of a natural guardian of a minor in the Hindu Law must be regulated by considerations of what should be regarded as best for the interests of the minor.

The discretion as to how the duty of discharging the debts binding on the minor should be performed rests on the guardian. The question in each case would be whether that discretion has been properly exercised. Consultation of proper advisers is a test though not conclusive on the Court if in its opinion the Court be convinced that both those consulted and the guardian made a great mistake. The right view is to consider whether in the circumstances that existed at the time of alienation the act would be regarded as a prudent one by men of ordinary prudence in dealing with the property of a ward. To constitute pressure or necessity, it is not necessary that there should be a demand by the creditor. Considerable latitude should be allowed to the guardian in the exercise of its discretion.

The positions of the natural guardian in Hindu Law, a trustee and a manager of a joint Hindu family compared and contrasted.

There is no difference between a sale and a mortgage in the applicability of the tests above referred to.

Per Sadasiva Aiyar J:—The only safe and convenient rule is that if the guardian of a Hindu minor alienates the minor's property because he considers it after weighing all the then existing circumstances to be in the best interests of the minor to make that alienation the minor is clearly bound by the act of alienation and that even if the guardian acted wrongly the alienee is protected if he acts in good faith after making due inquiry and if he is satisfied on the representations of the guardian and on his own independent inquiry that the guardian's acts appeared then to be clearly for the minor's benefit. Comparison between the powers of a natural guardian and those of a statutory guardian is of very little utility in deciding the powers of a natural guardian in Hindu Law.

Per curiam:—The fact that questions of law raised in the case were not easy of solution is not a good ground for disallowing the costs of a successful litigant.

Second Appeal from the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 555 of 1910 preferred against the decree of the Court of the District Munsif of Mannargudi in O. S. No. 292 of 1908.

*S. A. No. 1283 of 1911, 11th October 1912.

Vembu Iyer v. Srinivasa Iyengar.

T. V. Seshagiri Iyer for *T. R. Venkatarama Sastriar* for appellant.

T. Rangachariar for respondents

T. V. Seshagiri Aiyar. There is no proof of pressure in this case. Mere proof of antecedent debts will not do to justify sale. Guardian's powers are not as large as those of the trustees. Mere *bona-fiides* on the part of the guardian will not. do. Necessity is what is to be alleged and found. He cited *Subbiah Chetty* v. *Rungiah Gounden*[1], *Hanuman Prasad Panday* v. *Mussammat Bhoobu Kunwar*[2]. It must be shown that the guardian had no other available funds.

T. Rangachariar. If the guardian acts honestly and there are antecedent debts, that is sufficient. He relied upon *Kaihur Singh* v. *Roop Singh*[3], *Mahomed Mandal* v. *Nufur Mandal*,[4] *Succaram Moraraji* v. *Kalidas Kalyanji*,[5] *Arunachella Reddi* v. *Chidambara Reddi*.[6]

The Court delivered the following.

Judgments:—*Sundara Aiyar*, J. This is a suit for setting aside a sale made by the plaintiff's guardian in the year 1889. The suit was instituted on the 28th October 1908. The plaintiff was born on the 28th October 1887. He delayed the suit until the last day on which it was open to him to institute it. The sale was admittedly made for the discharge of certain debts due by the plaintiff's father.

Both Courts have upheld the sale. The District Munsif found that the sale was necessary in the interests of the minor. On appeal the Subordinate Judge seems to have confirmed the decree with some hesitation. He observed "I am unable to hold that with prudent management the debts could not have been cleared from out of the income." He also held that there was no clear necessity to support the sale. With respect to a plea of the defendants that the guardian had to take into account at the time of the sale the fact that two sisters of the plaintiff had shortly to be married, the Sub-Judge says' "The prospective marriages of daughters of the family and the consequent fear of not being able to clear off debts are too speculative reasons to justify a sale by a mother during the son's minority." He however confirmed the Munsif's decree on the ground that he was unable to say that the trustee did not act with due care and prudence in selling the properties and

1. (1897) 7 M. L. J. 191.
2. (1856) 6 M. I. A. 393.
3. (1871) 3 N. W. P. H. C. R. 4.
4. (1899) I. L. R. 26 C. 820.
5. (1894) I. L. R. 18 B. 631.
6. (1902) 13 M. L. J. 223.

that the discretion vested in the mother as a guardian cannot be said to have been misused. He observed, "The case falls within the discretion of a trustee and the discretion cannot be said to have been misused." He held that "the case did not fall within the words of the decisions supporting sales by a guardian." He continues, "But the logical extension of the ideas on the subject does not exclude the present sale from the category of legally valid sales." It is not surprising that the plaintiff considered that there were good grounds for an appeal from a judgment pronounced with so much doubt. I confess I have not felt any difficulty in confirming the decree of the Subordinate Judge. I am of opinion that the circumstances show that the sale was necessary. The decision of the case must depend on the general powers and duties of a guardian under the Hindu Law, apart from any provisions of the Guardian and Wards Act. There are numerous cases in the Indian Courts which have dealt with the position of a guardian, but hardly any one in which the precise question for determination in this case was the subject of judicial pronouncement. In England, it would appear, a guardian has no power to sell or mortgage the real estate of his ward. Infants came very early under the jurisdiction of the Court of Chancery in that country. All power to sell or to mortgage a ward's estate was vested in the Court and the guardian could not exercise it without the consent of the Court. See the matter discussed in *Dagdu Bin Ishad Pershad* v. *Sheik Sahib Valid Bandarkar*[1]. In this country, on the other hand, only a guardian appointed or declared as such by a court is under the supervision of the Court. The powers and duties of other guardians are governed by considerations, primarily, of what would be for the welfare of the minor. During the arguments the learned vakils on both sides cited various cases relating to the powers of a natural guardian, a guardian appointed by Court, the manager of a Hindu family and a trustee. And it was contended by Mr. Seshagiri Aiyar that the powers of a natural guardian were of the narrowest kind as compared with the others. I do not propose to enter on a comparison of the powers of these different classes of persons. It is true that the manager of a Hindu family is one possessing an estate in the property that he deals with, while a guardian has no estate in his ward's property. He is in management of the property solely belonging to another. But at the same time, it may be said that it is open to a manager to obtain the consent of all adult co-parceners to any transaction which he thinks proper to undertake; and that a guardian who has no so such means open to him ought to be

1. (1865) 2 B. H. C. R. 369 at 380.

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invested with a larger discretion than a manager. Again in some respects, the powers of a guardian must be taken to be inferior to those of a trustee, for a trustee has the legal ownership vested in him and, although his obligations to the beneficiary are no less than those of a guardian, persons who deal *bona fide* with him would receive larger protection on the ground that they are dealing with a person who is regarded by law as the owner of the property notwithstanding that he is under obligations to another. On this ground it was held in *Muthu Subbiah Chettiar* v. *Rungiah Goundem*[1], that a guardian's powers were less extensive than those of a trustee. It was assumed in that case that a natural guardian's powers would be inferior to those of one appointed by court. This seems to me to be not quite correct. The latter class of guardian is under the supervision of the court. The powers of guardianship, are in large part, exercised by the court itself and the appointed guardian can only act subject to its supervision—and control. Definite restraints are put upon an appointed guardian by statute. Those restraints would not be applicable to a natural guardian. There is no provision in Indian Law for a natural guardian, not declared as such by the court to take the opinion of the court as to the propriety of any transaction he may have to enter into on behalf of his ward. His duties must be regulated by considerations of what should be regarded as best for the interests of the minor. The leading case on the subject is *Hanuman Pershad Panday* v. *Musammal Baboon Muraj Kunwar*[2]. The following passage to be found at page 423, may be regarded as the text on which the subsequent decisions of the Indian Courts have been based. "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate." The question then would be whether any alienation or other transaction is for the benefit of the minor or necessary, so as to satisfy the phrase 'in a case of need.' There is, of course, another rule based on considerations of equity to the person dealing with the guardian, namely that, if he acts *bona fide* and after due enqniry believes that the transaction is for the minor's benefit, or necessary, it must be upheld as against him though a ward may have good reason to complain of conduct of the guardian. Prior to the enunciation of the law by the Privy Council, there appears sometimes to have been an idea in India that the creditors of a minor had no right to demand their debts during his minority and that they must wait till the minor attained age. This would of course, affect the guardian's power to

1. (1897) 7 M. L. J. 191. 2. (1856) 9 M. I. A. 393.

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deal with the estate for the discharge of the minor's father's debts. See Mcnaughten's "Principles of Hindu Law" Chapter VII, page 105; Trevelyan's "Law Relating to Minors" page 183; *Dagdu Bin Ishal Pershad* v. *Sheik Sahib Valid Bandarkar*[1]. This view was however, subsequently given up and Mcnaughten himself in his 'Precedents' cites a case decided in pages 120, 121 where it was held that the discharge of debts would be regarded as a 'necessity.' The word 'necessity' appears, at first sight, not to be calculated to give a clear idea of the scope of the cases coming within it. Necessity and benefit were not properly distinguished. Thus Trevelyan observes "apart from necessity it is not easy to say what is for the benefit of a minor's estate," and in an early case in Calcutta, Sudder Dewani Adlawt Reports, 1856, page 980, benefit to a minor seems to have been regarded as making the alienation necessary. The Court, observed "It is enough for us now to say that we hold that a mortgage entered into by the mother of a minor of a portion of the minor's property for the benefit of the minor is valid under the Hindu Law, that benefit being the cause of, or creating the necessity which has arisen." This confusion induced me to say. In re *Krishnaswami Das Reddi*[2] that it might be desirable to avoid the use of the words 'necessary' and 'necessity' and to substitute 'reasonable' and 'probable.' I am convinced however necessity and 'benefit' really import two different ideas and that it is desirable to keep in view the distinction between them. 'Necessity' seems to connote the idea of warding off an evil or the doing of something that cannot be avoided or of something which it is one's legal duty to do. To avoid the sale of a minor's property for a debt would be warding off an evil; conducting necessary repairs would also be an act of the same class. The maintenance of the minor would be a necessity as something which cannot be avoided. Performing his father's funerals would be a necessity as an act which it is his duty to perform. But over and above all these acts that are necessary there may be acts which are positively beneficial to the minor, and an alienation which would conduce positively to the benefit of the minor would be upheld apart from any necessity unless of course it is accompanied by other evil. Mr. Seshagiri Aiyar's main contention was that the discharge of debts cannot be regarded as a necessity unless the creditors pressed for the debt or at least demanded payment. The Sub-Judge has found that there was no demand in this case. It was contended that therefore it cannot be held that there was any necessity. No case has been cited, nor have we been able to find any, which has laid down that a demand is necessary to justify an

1. (1865) 2 B. H. C. R. 369 at 380. 2. (1912) M. W. N. 167.

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alienation to discharge a debt. It is impossible to lay down any such broad proposition. The creditors may be quite content to allow their debts to run on if they carry heavy interest. They might wait until the whole estate might be swallowed up by their debts. It would be unreasonable to say that a guardian in such circumstances cannot sell a portion of the estate so that the remainder may be saved for the minor's benefit. There can be no doubt that it is the duty of a guardian to pay off debts incurred by the ward's father. In England where as I have already observed, a guardian cannot mortgage or sell a ward's estate of his own accord, the discharge of the debts binding on the minor has been recognised to be a duty. There, no doubt, in order to fulfil that duty the guardian should apply to the Court for permission to mortgage or sell and the Court may make an order for either according to the circumstances of the case. But as a natural guardian, not declared as guardian, has in this country no right to ask for the advice of the Court, the discretion as to how the duty of discharging the debts binding on the minor should be performed must rest with him. I do not mean to lay down that if there is an estate earning a large income and the debts could be discharged in a short time out of the usufruct, a sale by the guardian for the discharge of the debt would be always upheld. The question in each case would be whether the discretion vested in a guardian has been exercised properly. He would be taken to have done so if he acted with due prudence and caution. Mr. Seshagiri Aiyar contended that the prudence which a man would exercise in the management of his own affairs would not necessarily be sufficient in the administration of property of a ward and relied on the observations contained in *Subbia Chetty* v. *Rungiah Gouden*[1] to that effect with respect to a trustee. I agree with him to a considerable extent. It is true that it would not be enough for the Court to say that if an adult had acted in the management of own property in the way in which a guardian has dealt with his ward's property, the adult owner's action would not be pronounced imprudent. There are risks which an owner may take that might be consistent with the conduct of a prudent man. A trustee or a guardian has no right to take the same risk in dealing with the property of another. This is the rule which has been applied in the English Courts with respect to the acts of a trustee. At the same time the Court has certainly to judge of the act of a guardian as it would appear to a prudent man at the time that the act was done. It will not set aside his acts on the ground that years after the act has been done it appears to the Court that the guardian might have

1. (1897) 7. M. L. J. 191.

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acted better. If the guardian consulted proper advisers, that would be a good test as to whether the act was prudent, for it would show that other disinterested persons took the same view of the propriety of the act as he himself did. The right view to lay down appears to me to be to consider, whether in the circumstances that existed at the time of the alienation, the act would be regarded as a prudent one by men of ordinary prudence in dealing with the property of a ward. No hard and fast distinction can be made between a sale and a mortgage. See *Mohamed Mandul* v. *Nafur Mandul* [1] where an act is sought to be supported, not on the ground that it was 'necessary' but on the ground that it was calculated to procure some difference in the application of the test to determine the validity of the guardian's act. There might also be a difference in applying this rule that a *bona fide* purchaser would be protected. If the act which was calculated to procure benefit for the minor was of a risky or speculative character, it would not be supported by the court. And it may be that the court would apply a rather strict test in deciding what should be regarded as speculative in a such a case. It may also be that a *bona fide* purchaser would find it difficult to obtain protection on the ground that a speculative transaction appeared to be beneficial to a minor. But in deciding whether an act which came within the purview of' 'necessity' should be upheld, I think considerable latitude should be allowed for the exercise of the guardian's discretion. See *Babaji Mahadaji* v. *Kristnaji Devaji.*[2] In *Arunachala Reddy* v. *Chidambara Reddy*[3] an alienation which was made partly for the discharge of debts binding on the minor was upheld. In the cases bearing on the question there was, generally, no doubt, some circumstance beyond the mere existence of a debt relied on to justify the alienation. Thus in *Sacaram Morarji* v. *Kalidas Kanhayi*[4] there were no other assets left out of which the debt could be discharged. In *Dagdu Bin Ishad Pershad* v. *Sheik Sahib Bandarkar* [5] the Court found that the alienation was for the discharge of debts. But it added "and it was absolutely necessary," but no other circumstance relied on is mentioned as supporting the necessity for sale. In *Kaihur Singh* v. *Roop Singh*[6] it was observed that no immediate pressure or suit need be proved in order to support a sale for discharging a debt. In *Balaji Mahadaji* v. *Krishnajee Devaji*[7] it appears that the debt had not become due at the time of the alienation. The language of the Privy council in *Hanooman Persaud Pandey*[8] does not in my opinion, support the conten-

1. (1899) I. L. R. 26, C. 820.
2. (1878) I L. R. 2 B. 666.
3. 13 M. L. J. 223.
4. (1894) I. L. R. 18 B. 631.
5. (1865) I. L. R. 2 B. H. C. R. 369.
6. (1871) 3. N. W. P. H. C. R. 4.
7. (1878) I. L. R. 2 B. 666.
8. (1856) 6 M. I. A. 393.

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tion that unless there was a demand by the creditor, a sale for the discharge of his debt would not be justified. Their Lordships say "The actual pressure on the estate, the danger to be averted or the benefit to be conferred on it in the particular instance is the thing to be regarded. The words "actual pressure" are relied on to support the argument that the person in possession as guardian must have been *pressed* by the creditor to pay the debt. I do not think that the language "pressure on the estate" necessarily signifies this. A debt may be a pressure on the estate even though the creditor has not yet demanded payment of it. Whether it is so in any particular case would depend on the circumstances. In this case it is found that there were other debts at the time of the death of the minor's father. Three sales were made in 1888 for the discharge of a portion of them. Apparently soon after the death of the father, the guardian considered it desirable to take measures to discharge all debts. The sale which is called in question here took place shortly after the previous sales. All were probably parts of one single scheme that the debts should be discharged if possible. The Sub-Judge is, in my opinion, not justified in holding that the guardian acted in a speculative spirit in having regard to the fact of the prospective expenditure on account of the minor's sister's marriage. The District Munsif's judgment shows that about Rs. 1000 was required for the current expenditure of the family. After making provision for Government kist and this expenditure, there was apparently very little to save for the discharge of debts, and the prospect of having to incur further debts for the marriages of two girls would certainly influence a prudent guardian in deciding what steps should be taken for the discharge of the debts. I am of opinion that the discharge of the debts was necessary in the circumstances of the case and that the defendants need not rely solely on the fact that the alienation was an act done by the guardian honestly and after taking advice from others. The mere consultation of others would not always be a ground for upholding a transaction if the Court is convinced that both those consulted and the guardian made a grave mistake. The conclusion arrived at by the Subordinate Judge is right and this second appeal must be dismissed with costs.

The respondent has preferred a memo of objections against the Subordinate Judge's disallowance of his costs in the appeal. I do not think that the fact that the questions of law raised in the case were not easy of solution was a good ground for disallowing the costs of the successful litigant. The order as to costs must be set

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aside. The respondent will have his costs in this Court and in the Lower Appellate Courts.

Sadasiva Aiyar J :—The important question of law argued in this case relates to the power of the natural guardian of a minor Hindu to effect an alienation of the minor's property so as to bind the Minor. Numerous cases have been quoted on both sides in which the disputed alienation has been upheld sometimes on the ground of legal necessity, sometimes because it was reasonable and proper, again because the guardian did not act through caprice and extravagance but in the best interests of the minor, sometimes because it was "for the minor's benefit" and so on. In a few cases, the alienation has been upheld because the alienee acted *bona-fide* in obtaining the alienation from the guardian after making proper enquiries as to the actual necessity or as to the alienation being for the minor's benefit or as to the existence of pressure from creditors. In Mayne's Hindu Law, paragraph 218 it is said "He will also be bound by the act of his guardian in the management of his estates, when *bona-fide* and for his interest and when it is such as the infant might reasonably and prudently have done for himself, if he had been of full age. But not where the act appears not to have been for his benefit and the person who so deals with the guardian is bound to enquire into the propriety of his act. And where the act is done by a person who is not his guardian but who is the manager of the estate in which he has an interest he will equally be bound, if under the circumstances the step taken was necessary, proper or prudent." In *Sucaram Morarji* v. *Kalidas Kanhaji*[1] it was said quoting from West and Buhler, JJ. that a widow managing for her infant son (like any other manager when minors are interested as co-parceners) can deal with the property only to meet existing necessities but the other party is protected by good faith and reasonable enquiry. In *Mahammad Mundal* v. *Najur Mundal*[2] it was held that the principle of the decision in *Hanuman Prasad Panday* v. *Mussammat Bhoobee Kunwar*[3] was applicable also to the *bona fide* manager of an infant's estate, (in that case the grandmother of the plaintiff) that an alienation by sale stands on the same footing as an alienation by mortgage and that Mr. Mayne's opinion in his Hindu Law sec. 196 is correct that when the act is done by the person who is not his guardian but who is the manager of the estate in which he has an interest, the minor will equally be bound, if under the circumstances the step taken was necessary, proper or prudent.

1. (1894) I. L. R. 18 B. 631. 2. (1899) I. L. R. 26 C. 820.
3. (1856) 6 M. I. A. 412.

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In *Kaihur Sing* v. *Roopsing*[1] it was held that even without actual pressure npon the minor's estate an act of the guardian which at the time of the alienation appeard on the reasonable grounds to be dictated by prudence and for the minor's benefit is binding on the minor. In *Tejpal* v. *Anaga*[2] the learned Judges say "We think that the preponderance of authority is in favour of the proposition that a Hindu mother as the natural guardian of her minor son has a right to deal with and dispose of her minor son's estate for his benefit." It will be seen that the learned Judges say nothing about "pressure" and do not use the phrase 'necessity' or 'legal necessity' which vague phrase has been interpreted in various ways in different decisions. In *Subba Reddy* v. *Kotamna*[3], Davies and Sankaran Nair JJ. held that where a guardian has acted in the interests of the minors after consideration of the circumstances then in existence, his act was binding on the minors though it was afterwards found that the act was really injurious to the minors (as the minors got only 4 acres through the said guardian's act while they were really entitled, as afterwards found, to 7 acres of land). This case shows that where a guardian acts according to his best lights for the minor's benefit and his act was what an ordinary man of prudence would do where his own property was concerned, such act is binding on the minor. In the case in *Arunachala Reddy* v. *Chidambara Reddy*[4] it was held that alienations made in part for the purpose of discharging the liability incurred by the father of the minor and in part in connection with litigation in which the question of the validity of the minor's adoption was involved, was binding on the minor if there was nothing to suggest that in making the alienation, even though the alienees were her relations, the minor's mother was acting otherwise than in the interests of the minor's estate. I think the only safe and convenient rule is (a) that if the guardian of a Hindu minor alienates the minor's property because he considers it after weighing all the then existing circumstances, to be in the best interests of the minor to make that alienation, the minor is clearly bound by that act of alienation : (b) that even if the guardian acted wrongly, the alienee is protected if he acts in good faith after making due enquiry and if he is satisfied on the representations of the guardian and on his own independent enquiry that the guardian's act appears then to be clearly for the minor's benefit (I think that any comparison between the powers of a natural guardian and of guardian to whom the Guardian and Wards act applies as was done in the case of *Muthu*

1. (1871) 3 N. W. P. H. C. R. 4.
2. (1901) I. L. R. 25 A. 59.
3. (1904) 14 M. L. J. 442.
4. (1902) 13 M. L. J. 223.

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Subbiah Chettiar v. *Rungiah Gounden*[1] is of very little utility in deciding as to the powers of a natural guardian under the Hindu Law. The legislature is not bound to follow the common law and can give powers and impose restrictions on certain kinds of guardians according to pleasure). In the present case I understand both Courts to find that the alienee (the 6th defendant) acted *bona fide*, and that he did not want to make any profit at the expense of the minor in obtaining the alienation of 1889 from the minor's mother acting as the minor's guardian. Though no specific issue as to the alienee's good faith and the enquiries made by him was raised in the suit, the first issue is generally worded as to the binding character of the alienation on plaintiff and the cross-examination of the 6th defendant (defendant's witness No. 15) by the plaintiff's vakil was directed to the question whether 6th defindant did make proper enquiries as to the debts due by the minor's deceased father and as to whether there was pressure upon the estate and so on. The plaintiff was therefore not taken by surprise and I do not think it necessary that a specific issue should now be raised on the question of the alienee's good faith or that an opportunity should be given to the parties to adduce further evidence in this case. I am also clear on the evidence that (as found by both Courts), the plaintiff's mother after consulting her husband's relations and friends considered it the most prudent course and for the clear benefit of the minor to make the sale of the property to the 6th defendant who offered the highest price then available for it. I might state that the learned Subordinate Judge was not justified in his findings on three questions of fact, his findings being at variance with those come to by the learned Munsif. The Subordinate Judge held that a debt of only Rs. 4,000 remained due on the date of the plaintiff's father's death whereas plaintiff's own 16th witness admitted the existence of a debt of Rs. 7,000 at the father's death. The Subordinate Judge also ignored the documents Exhibits I and II which show the existence of debts to the extent of about Rs. 3,500 in addition to the Rs. 4,000 due under Exhibits III V, VI, VIII, IX and X. The learned Subordinate Judge also disbelieved the genuineness of documents Exhibits XI and XIII, while even the plaintiff in the ground of appeal before him (see ground 8) did not deny the genuineness of those Exhibits but only stated that they should not have been admitted in evidence as they were produced too late and that importance should not have been attached to them. On the question of pressure by creditors also

1. (1897) 1 M. L. J. 191.

the Subordinate Judge ignored the fact that some properties had already been sold to discharge debts and erred in differing from the Munsif by brushing aside the circumstantial evidence indicating the pressure of creditors on the guardian and in practically requiring direct evidence to be given by the creditors themselves of such pressure after the lapse of twenty years. In the result I agree that this second appeal should be dismissed with costs, the memorandum of objections put in by the respondents 1, 3, 4, 5, 6, and 10 in respect of the costs disallowed by the Subordinate Judge must be allowed with costs.

the Subordinate Judge ignored the fact that some properties had already been sold to discharge debts and erred in differing from the Munsif by brushing aside the circumstantial evidence indicating the pressure of creditors on the guardian and in practically requiring direct evidence to be given by the creditors themselves of such pressure after the lapse of twenty years. In the result I agree that this second appeal should be dismissed with costs, the memorandum of objections put in by the respondents 1, 3, 4, 5, 6, and 10 in respect of the costs disallowed by the Subordinate Judge must be allowed with costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Narayana Aiyar and another ... *Plaintiff* (*Petitioners.*)

v.

Anai Aiyar *alias* Mahadeva Aiyar *Defendant* (*Respondent.*)

Will—Construction—Vesting of legacies—Decree, form of—Suit by legatees for interest due,

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A will ran as follows.—

" After my death, minor N. aged 3 years and V. aged 1 year ... ... these two after the two above mentioned minors have become majors shall take in equal portions the principal Rs. 1000 and the balance of interest paid towards the documents as long as I live. If one of them die while the other is a minor, the other who survives shall take, after the said minors have become majors without any objection the principal and interest that may be du after my death as above mentioned. Nobody has right to demand the said amounts either at the time of minority of the said minors or at the time when one has become major."

As I have given up by means of this will the said amounts to be taken by the two minors after they have become majors at their pleasure, as mentioned above, the said Muthusami Aiyar, the father of the said minors, ... has no right after my death either to the said amount or to its interest."

Held on the construction of the will that the property vested in the minors even before majority, but that they were only not entitled to receive it; and that, consequently, in a suit for recovery of interest and rent due on the land referred to in the will, that the plaintiffs—legatees would have a decree for the amount sued for, but the amount realized would be kept in court deposit until the second plaintiff attained majority and that the plaintiff might apply to the court for the investment of the money in Government Pronotes. *Gordhandas* v. *Bai Ramcooer Bai*,[1] distinguished.

Petition under Sec. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore in S. C. S. No. 475 of 1911.

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*C. R. P. No. 829 of 1911. 11th November 1912.

1. (1901) I. L. R. 26 B. 449.

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V. Viswanatha Sastri for petitioner.

K. Jagannatha Aiyar for respondent.

V. Viswanatha Sastri. The legacy is a vested one. It is only the enjoyment that is postponed till majority. Theobald on Wills p. 584 and 586, Jarman vol ii p. 1405 *Simmonds* v. *Cock*[1] *Harris* v. *Brown.*[2]

K. Jagnnatha Aiyar. Here vesting has been postponed till after majority. The legacy cannot be said to be vested in this case as there is no gift of the interim income to the legatee. Vesting can be postponed under the Hindu law till majority; see *Gordhandas* v. *Bai Ramcooer.*[3]

The Court delivered the following

Judgment:—The question in this case relates to the construction of a will made by a Hindu lady. It was apparently not drafted by any professional lawyer and its terms are not happily expressed. The suit was instituted by her two minor great grandsons (sons of her grandson) whom she undoubtedly intended to benefit by the dispositions contained in the will, for rent due on a rental instrument executed by the defendant for a piece of land which he had usufructuarily mortgaged to the testatrix. No letters of administration with the will annexed were taken out by any one and the suit is instituted by the plaintiffs as beneficiaries under the will. It has been dismissed by the Lower Court on the ground that the plaintiffs obtained no rights under the will until the attainment of the age of majority by both of them. The substantial question for decision is whether this construction of the will is right. Its terms are as follows:—* * * * After my death (1) Minor Narayana Ayyan aged 3 years and (2) Venkatarama Ayyan aged 1 year, my great grandsons and sons of the eldest wife of Muthurama Ayyan, the adopted son of Muthusamy Ayyan, my son, these two after the two above mentioned minors have become majors shall take in equal portions the principal Rs. 1,000 and the balance of interest due, deducting the interest paid towards the documents as long as I live. If one of them die while the other is a minor, the other who survives shall take after the said minors have become majors without any objection the principal and interest that may be due after my death as above mentioned. Nobody has right to demand the said amounts either at the time of the minority of the said minors or at the time when one has become major.

1. (1861) 54 E. R. 704. 2. (1901) I. L. R. 28 C. 621.
3. (1901) I. L. R. 26 B. 449 at 467.

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As I have given up by means of this will the said amounts to be taken by the two minors after they have become majors at their pleasure, as mentioned above the said Muthuramayyan the father of the said minors and the adopted grandson of mine has no right after my death either to the said amount or to its interest, Thus I have executed this will with firmness * * * *

It will be observed that the interest on the two mortgages bequeathed under the will accruing subsequent to the death of the testatrix until both the legatees should attain age is to be taken by them. Their father is expressly disinherited by the testatrix. No intermediate estate is created in favour of any one else till the minor legatees attain age.

These facts are indications that the amount was intended to vest in the legatees immediately on the death of the testatrix. The absence of any gift over in case of the minors dying without attaining majority is also an indication against the construction that the vesting should be postponed until their majority the presumption being that the testatrix did not intend to die intestate. On the whole we are of opinion that the expression in the will that the legatees should *take* the principal and the interest accruing (after the testatrix's death) on the younger attaining majority refers only to the time when they were to take possession of the legacy and that the gift was intended to take effect immediately. We do not think that the donor intended to keep her estate in abeyance until both her great-grand children should attain majority. We do not consider it necessary to refer to English cases as to vesting of legacies which are of highly technical character and cannot be applied without much caution to conveyances executed without professional aid in this country. The vesting of legacies charged upon real estate is governed in England by rules derived from the common Law while the vesting of bequests of personality including chattels real is governed by rules derived from the Civil Law. The respondent's Vakil relies on *Gordhandas v. Bai Ramcoover*[1], but there were several reasons in that case (See p. 467 and 468) for holding that the estate was intended to be kept in abeyance for a time. We must hold that the plaintiffs obtained a vested interest on the death of the testatrix. It is however clear that under the will they are not entitled to obtain possession of the interest on the amounts bequeathed until the younger of them attains majority. The 1st plaintiff became a major after the institution of the suits but the 2nd plaintiff is still a minor. The will did not appoint any trustee or executor and there is no

1. (1901) I. L. R. 26 B. 449.

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administrator entitled to receive and keep possession of the interest until the attainment of majority by the 2nd plaintiff. The Subordinate Judge's decree must be reversed. The plaintiffs will have a decree for the amount sued for but the amount when realized from defendant will be kept in court deposit until the second plaintiff attains majority. The plaintiffs may apply to the court for the investment of the money in Government promissory notes. The defendant will pay the plaintiff's costs in both courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller, and Mr. Justice Abdur Rahim.

Muthe Venkatachellepati and others ... Appellants. (*Plaintiffs*).

v.

Row-Sahib Pyinda Venkatachellapathy-garu and others ... Respondents. (*Defendants*).

Registration Act S. 49—Admissibility of unregistered document in evidence—Collateral purpose—Court's power to pass conditional decree in ejectment suit.

Muthe Venkatachellapathy v. Pyinda Venkatachellapathy.

Per Curium:—Courts in India have power to refuse to grant a decree to the plaintiff except on terms indicated by obvious considerations of justice.

Plaintiff had executed a deed of mortgage in favour of the defendant in November, 1894. In 1896 he executed a deed of sale Ex. A with respect to the same property to defendant for a certain consideration. On the same day as the sale deed Ex. A a letter was written which showed that the transaction was intended to be an usufructuary mortgage. The defendant sued as upon the usufructuary mortgage and the suit was thrown out for non-registration of the letter. Plaintiff filed the present suit for recovery of the property on the ground that the sale was not intended to be a sale and consequently the lands never passed to defendant.

Held that it was competent to the court to decree possession to the plaintiff on condition that plaintiff do refund the consideration received by him.

Held. Per *Rahim* J. (*Miller* J. dissenting). S. 49 of the Registration Act only shows that a document requiring registration cannot be proved in order to support a transaction affecting immoveable property or to enforce the terms of the document referred to: but it is admissible to prove the circumstances in which the property came to be in defendant's possession.

Per *Miller* J.—The document cannot be admitted in evidence to prove the nature of the possession of the defendant or the circumstances under which he derived possession, which the plaintiff sought to prove in the case, to entitle him to relief.

Appeal from the decree of the Court Subordinate Judge of Cocanada in O. S. No. 22 of 1907.

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*A.S. Nos. 209 of 1908 and 46 of 1909. 23 September. 1912.

P. Narayana Murti for appellants.

T. R. Ramachandra Aiyar for respondents.

The Court delivered the following

Muthe Venkatachellapathy v. Pyinda Venkatachellapathy.

Abdur Rahim. J.

Judgment :—*Abdur Rahim* J :—These two appeals arise in a suit to recover certain immoveable property. The suit was instituted by the appellant in A. S. No. 209 of 08. He is the respondent in the other appeal No. 46 of 09. The facts that led to the institution of the suit, so far as they are relevant to these appeals, are these :—The plaintiff executed a deed of mortgage in favor of the defendant in November 1894. In 1896 he executed a deed of sale with respect to the same property for Rs. 8,000 and odd made up of the amount of the previous mortgage and Rs. 4,000 then paid to the plaintiff by the defendant. The sale deed is marked as exhibit A in this case. On the same day as exhibit A document was written which showed that the transaction between the parties was intended to be an usufructuary mortgage and not a sale. This document which is in the shape of a letter was not registered. Then in 1900 the defendant in the present suit tried to enforce what was intended to be a usufructuary mortgage, but it was ultimately held by the High Court that the mortgage could not be enforced as the document on which reliance was placed for the purpose was not registered as required by the law. The present suit is for the recovery of the same property and the plaintiff's case is that as the parties did not intend that Exhibit A should be treated as an effective deed of sale the property never passed to the defendant. The Subordinate Judge has decreed the suit but has made it a condition of the decree that the plaintiff should make over to the defendant whatever money he received under the deed.

The main question in appeal 209 is whether the Subordinate Judge was right in passing such a conditional decree. I am of opinion that he was. Taking the transaction to be void on the ground that the so called deed of sale was never intended to be given effect to, there can be no doubt that under section 65 of the Contract Act the defendant will be entitled to the restitution of whatever advantage the plaintiffs derived by the abortive transaction.

The contention on behalf of the appellant is that the court, while giving the plaintiffs a decree for possession to which he is entitled cannot make it a condition precedent to recovery of possession, that he should make restitution because section 65 of the Contract Act, does not give such a power to the court. But the fact that this section does not give the power in so many words, is not to my mind, conclusive. There is nothing in section 65

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which suggests that the court has no such power and in my opinion, independently of the Contract Act it lies perfectly within the competence of the court, in a case of this nature, to impose a condition which would do complete justice between the parties. There is no reason why the defendant should be driven to a fresh suit to recover the money which he paid for the property which the plaintiff seeks to recover on the ground that the intended transaction proved infructuous and it is for the plaintiff to show that we, cannot in this suit restore both the parties to their original position. No doubt this suit is one in ejectment and cannot therefore be called a suit in which an equitable relief is sought, and the learned pleader for the appellant contends that we have got the power to attach such a condition to the decree only in cases where the relief sought is a relief in equity. But I agree with the ruling in *Gurraj Baksh* v. *Kazi Hamid Ali*[1] that even in suits in which the relief sought is not, strictly speaking, an equitable relief, the court has the power in a proper case to refuse to grant a decree to the plaintiff except on terms indicated by obvious considerations of justice and this view also finds support from Mellor J. dictum in *Clough* v. *London and Northwestern Railway Company*.[2] In this country there has never been any distinction between equitable and legal jurisdictions and the same court has the power in a proper case to take note of the equities of the parties although the action may be strictly one at law. The principle upon which I think we ought to act in this case is similar to taht embodied in several statutes of the Indian legislature, for instance section 41 of the Specific Relief Act, Section 55, Sub-section 6, clause (*b*) of the Transfer of Property Act and section 86 of the Trusts Act. I do not propose to consider whether we could declare a charge or a lien on the property in the circumstances of the case as was done in *Kunhiamma Umma* v. *Ibrayam Haji*[3] and *Padamma* v. *Themana Amma*[4] as we are not called upon to do either.

I would therefore hold that before the plaintiff recovers the property he must restore to the defendant whatever advantage he has derived under the so called sale. The parties agree that there should be no claim for mesne profits or interest on the amount paid by the defendant. The decree of the Subordinate Judge will therefore be modified accordingly, that is to say, the decree in favour of the plaintiff should contain a condition that the plaintiff do pay back to the defendant Rs. 8,250, the amount paid by the defendant to the plaintiff. With this modification the appeal 209 will be dismissed with costs.

1. (1886) I. L. R. 9 A. 340 at page 345. 2. (1871) L. R. 7 Ex. 26 at 37.
3. (1912) 12 M. L. T. 264. 4. (1895) I. L. R. 17 M. 232.

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The other appeal raises the question whether certain evidence, has been rightly admitted to show that the transaction evidenced by Exhibit A was not intended to be given effect to as a sale. The evidence objected to on this point is that which is adduced to show that what the parties really intended was that there should be a usufructuary mortgage and not a sale, and I can hardly doubt that that was what the parties intended. This evidence is practically a reproduction of the recitals of the letter written contemporaneously with Exhibit A, already alluded to. The document was not produced at the trial but no objection was taken to the reception of its contents by secondary evidence. Mr. Ramachandra Aiyar, the learned vakil for the appellant, however contends relying upon section 49 of the Registration Act that the document itself could not be used in evidence at all. S. 49 says: "No document required by S. 17 to be registered shall.........

(*a*) affect any immoveable property comprised therein, or (*b*) confer any power to adopt, or (*c*) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered." The question is whether any such document has been received as evidence of a transaction affecting inmoveable property. I take it, what is meant is that a document which is required to be registered by the law cannot be received as evidence in support of a transaction affecting inmoveable property. What was, then, the object with which the evidence in question in this case was given? As I understand it, it was adduced in order to show that the so called deed of sale was not intended to operate as a transaction affecting certain immoveable property. It was not adduced to show that the parties entered into a valid transaction in the nature of a usufructuary mortgage. There is no question in this case of enforcing any such mortgage. The plaintiff relied upon his title which does not depend upon that mortgage in order to recover the property. What he says is that Exhibit A cannot stand in the way because it was never intended to be an operative transaction. No doubt, in order to prove that, he has got to show that the transaction which was intended was something else, that is, a mortgage transaction. But, though it may be necessary to prove that, in order to prove that Exhibit A was not intended to create an effective sale, the object was not to prove that there was an effective mortgage. S. 49 does not say that a document which requires registration shall not be received in evidence for any purpose if it is unregistered. Now, I think there can be little doubt that it would be permissible for the plaintiff to prove that there was no valid sale by adducing

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evidence to the effect that Exhibit A was not intended to be given effect to. S. 92 of the Evidence Act which prohibits the admission of any oral evidence varying or contradicting the terms of certain documents has no application. As regards the provision of the Registration Act it has to be borne in mind that the main object of the Act is to prevent documents of a certain class having any effect unless they are registered. The primary object of that Act is not to deal with the questions of evidence pure and simple. If the question, whether Exhibit A, the document of sale, was intended to be a real transaction of sale or not, could be proved by other evidence, it appears to me, there is no good reason for holding that it could not be proved by a document which was intended to be a mortgage but which would fail to have that effect by reason of its not being registered, unless of course the language of section 49 is clear enough to that effect. As I read it, it only shows that you cannot prove a document which requires to be registered, in order to support a tranasction affecting immoveable property. But this is not what is intended in this case. In my opinion the Full Bench decision in *Raja of Venkatagiri* v. *Narayana Reddi* [1] bears out this view of Section 49. There, what was sought to be proved, was, the terms of an agreement to lease, which was not registered, in order to show that the plaintiff was entitled to damages for breach of the contract. Now the contract as evidenced by the unregistered agreement was certainly a transaction affecting immoveable property. But, nevertheless, it was held that its terms could be proved for the purpose, not of enforcing the contract but for proving the existence of the contract and showing the damages sustained by the plaintiff by the non-performance of the contract. But it is argued that that was not a suit affecting immoveable property, but I do not see how that makes any essential difference except in cases where the suit is brought to enforce the terms of a document of which the law requires registration but which has not been registered. No doubt there is a sentence in the Full Bench case referred to which, if it stood alone might to some extent countenance the contention of Mr. Ramachandra Aiyar but the decision itself supports the view which I have stated. The ruling in *Subbayya* v. *Maddulithiah*[2] has no application to this case I am, therefore, of opinion that section 49 of the Registration Act does not apply nor does section 92 of the Evidence Act. There is no force in the contention that the suit is barred by *res judicata* by reason of previous proceedings. I would therefore dismiss the appeal.

1. (1893) I. L. R. 17 M. 456. 2. (1907) I. 17 M. L. J. 469.

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Miller J.—I have asked my learned brother to deliver the first Judgment in this case because his Judgment covers the whole field whereas mine is confined to one point.

I regret to say that I have come to a different conclusion from him on the question whether this alleged mortgage, this letter which converted Exhibit A into a mortgage and of which secondary evidence has been given is admissible in evidence or not. In my opinion it is not admissible because S. 49 of the Registration Act forbids its admission. If it is not admissible, then, it is not denied that no admission of the defendant can be admitted to prove its contents; and the result would be, if it is not admissible, as I understand it, that all we have is Exhibt A and the plaintiff's suit must be dismissed. Now S. 49 of the Registration Act says that no document required by S. 17 to be registered is to be received as evidence of any transaction affecting immoveable property. Now it is not denied that this letter which is not before us is a document which required registration under S. 17. If the court is asked to recover it as evidence of a transaction affecting immoveable property the court must refuse so to receive it. As I understand the plaintiff's case it is possible he might simply have placed his case thus: "This is my land. There was no sale to the defendant. Defendant is in possession. I asked him but he did not give up possession". The answer to that would no doubt be the land was sold by Exhibit A. Plaintiffs would then have to show that the sale was something other than a sale and probably the result would have been the same as it is now. But the plaintiff did not so frame his plaint. He based his claim on a mortgage transaction. He says "There was what was intended to be a usufructuary mortgage which has failed for want of registration and I am entitled to possession on account of the failure". What, then, did he want to prove by this document of which he tendered secondary evidence? He wanted to prove, as I understand it, that this possession of the defendant was under a mortgage which was no mortgage. That is to say, he wanted to prove a transaction which affected immovable property though the actual document would not, of course, have any effect upon the title in the particular case for want of registration. The transaction he wanted to prove was a mortgage and that is a transaction affecting immoveable property though the document for want of registration did not have any effect. Now according to the Full Bench case *Rajah of Venkatagiri* v. *Narayana Reddi*[1] it does not matter that the document may have the effect of proving a transaction affecting immoveable property if it is used:—That is how I understand it—if it is used for the purpose

1. (1893) I. L. R. 17 M. 456.

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of proving a transaction which does not affect immoveable property in any way; then it may be received in evidence. That, it seems to me is not so here. Not only was the purpose to prove a transaction which does affect immoveable property but the purpose of proving it was, to affect immoveable property to enable the plaintiff to disturb the possession and replace it by his own. The case is nearer to that in *Kanuparthi Subbayya* v. *Kurnum Maddulitith*[1] where Benson and Wallis JJ. refused to admit an unregistered permanent lease which was put forward not to prove *i. e.*, not in order to enforce the lease, but to prove the nature of the adverse possession which was set up by the defendant. The Judges said, "The transaction to be proved is the nature of adverse possession, that is, a transaction which affected immoveable property. This document is put in to prove that transaction and that cannot be allowed". So here, it seems to me, though the case is not exactly the same as in that case. The document is put forward to prove that there was a mortgage and not a sale. Because there was a mortgage and not a sale the defendant is not entitled to retain possession and therefore the document is in this case put forward not only in order to prove a transaction affecting immoveable property, but further, if that makes any difference in order that the result of the suit may be a decree affecting immoveable property based on this transaction. I hold that the document is not admissible in evidence, according to the decisions in this Court as I understand them. The plaintiffs' suit for possession will have to be dismissed and I would dismiss it without costs, but as the effect of my learned brother's decision is that both the appeals should be dismissed with costs, that will be the order of the Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present —Mr. Justice Miller and Mr Justice Abdur Rahim.

Varagima Ramasomasundara Arulappa Naiker *Appellant.**

v.

V. R. R. M. S. T. M. R. Murugappa Chettiar and others *Respondents.*

Execution Sale—Interest taken by the purchasers—Tests for determining—Impartible estate—Law in Madras in 1869—Execution Sale in 1869—Hindu Law—Alienation by Co-parcener—Suit by son and Co-parcener—Difference—Onus—Civil Procedure Code (XIV of 1882) S. 373—Applicability—Second suit on different Cause of action—Right of suit—Speci Successones.

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*A. S. No. 20 of 1909. 29th October 1912.

1. (1907) 17 M. L. J. 469.

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In determining the interest which a purchaser in an execution sale takes the following circumstances: namely, the character of the debt, the terms of the sale certificate which formed the contract of the parties, the law as interpreted at the time of the sale, the frame of the suit, the judgment and decree, the execution proceedings, the advertisement for sale, the adequacy or inadequacy of the purchase money are all circumstances which may legitimately be considered in the enquiry and no single circumstance can be regarded as conclusive by itself.

Held, also on the question of the interest taken by a purchaser in execution sale of a decree against the holder of an impartible Zemindari in Madras in 1869 for debts (not immoral or illegal), that the purchaser took the whole Zemindary and not merely the life interest. The law in Madras in 1869 was that the holder of an impartible Zemindary was not possessed of absolute powers of disposition over the corpus, but, apart from the necessity of conforming to the requirements of any special regulation such as Regulation XXV of 1802, he was like any other head of a co-parcenary, competent to bind the estate by debts incurred or alienations made for purposes which are regarded by the Mitakshara law as proper and justifiable.

The difference between the case of a son attacking a sale by the father and that of a co-parcener attacking a sale by the manager is essentially one of onus. In the case of the son the burden is on him of showing that the debt was incurred for illegal or immoral purposes while in the case of other co-parceners the creditor has to prove that the debt was incurred for proper or necessary purposes.

S. 373 C. P. C. (1882) cannot be a bar to a fresh suit based on a different cause of action.

Quare:—Whether a person having a mere chance of succession to an estate can maintain a suit for declaration that the interest purchased by the defendant in an execution sale was barely the life interest of the then holder of the estate?

Appeal from the Court of the Subordinate Judge of Tinnevelly in O. S. No. 11 of 1906.

The facts appear in sufficient detail in the judgment.

C. V. Ananthakrishna Aiyar for appellant.

K. Srinivasa Aiyangar, S. Srinivasa Aiyanjar, and *A. Krishnasami Aiyar* for respondents.

C. V. Ananthakrishna Aiyar. It is the right, title and interest of the zamindar that is sold. The contract between, the parties and the court sale have to be interpreted in reference to the law as was understood by the parties in court at the time. See *Abdul Azizkhan* v. *Appasawmi Naick*,[1] Kannivadi Case. There are 3 stages in the development of the law as regards impartible estates. The view that prevailed until the decision in *Gowri Devamma Garu* v. *Ramanandoragaru*,[2] which is some time before the sale of the Zamindari in question, was that the Zamindar for the time being had an estate analogous to the estate tail in England, and as such he had

1. (1901) I. L. R 27 M. 131 2. (1870) 6. M. H. C. R. 93.

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not the power to alienate the impartible estate even for necessary purpose. In this view, the expression 'right, title and interest' will be understood as passing only the life estate of the Zamindar.

The view put forward in *Gowri Devamma Garu* v. *Ramanandoragaru*[1], is that the Zamindar is in the position of a manager of a joint Hindu family. The doctrine of the pious obligation of a son to pay the debts of the father, whatever may be their nature, was not recognised in Madras until *Ponnappa* v. *Papu Ayyangar*[2]; and in the case of impartible estates it was for the first time recognised only in the *Sivagiri case.*[3]

My contention therefore is that even if it be taken that the view of *Gowri Devamma Garu* v. *Ramanandora Garu*[1], was the prevalent view on the date of the sale of the suit Zamindari, the defendant cannot claim any right to the absolute interest in the Zamindari under the sale certificate; he cannot succeed unless he can substantiate that the debts were incurred for necessary purposes. The court will not have regard to the fact that the person now questioning the sale is not a collateral member but a son.

The 3rd stage is when the courts recognised this absolute power of alienation in the Zamindar. The *Sartaj Kuari case* [4] and *Beresford* v. *Ramasubba*[5] in this Presidency.

The date of sale is therefore material in judging the extent of interest sold: *Veera Soorappa Nayani* v. *Errappa Naidu.*[6]

There is no evidence in this case pointing to the fact that there was justifiable necessity for the alienation. The learned Vakil then commented on the evidence in the case.

S. Srinivasa Aiyangar. The argument as to the date of the sale has no force. The date is only one of the many circumstances *Kanaka Ramayya Nagaraya Gounden* v. *Minakshi Naidu.*[7] There was no course of decisions as was suggested on the other side comparing the position of the Zamindar to that of a holder of an estate tail. The Zamindar was likened to a manager as early as *Chidambara Setti* v. *Katama Nachiar* [8] and *Muthu Vellian Chetty* v. *Katama Nachiar* [9] and in *Gouri Devamma Garu* v. *Ramanandora Garu*,[10] the H. C. does not purport to depart from earlier precedents.

As regards the question of the pious obligation of the son the P.C. both in *Girdhari Lal's case*[11] and in the *Sivagiri case*[3] discoun-

1. (1901) I. L. R. 27 M. 131.
2. (1881) I. L. R. 4 M. 52 (F.B.)
3. (1881) I. L. R. 4 M 1.
4. (1888) I. L. R. 10 A. 272.
5. (1888) I. L. R. 13 M. 197.
6. (1906) I. L. R. 29 M. 484.
7. (1911) 2 M. W. N. 328.
8. (1866) 3 M. H. C. R. 260.
9. (1869) 4 M. H. C. R.
10. (1870) 6 M. H. C. R. 93.
11. (1879) L. R. 1 I. A. 321.

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tenance the view of the Madras High Court that there was any course of decisions. Again, even in cases which were decided subsequent to *Girdharee Lal*[1] sales and mortgages long prior tothe decision were upheld to the extent of the entire interest and the argument based upon the fact that the sale in question was in 1869 is unmeaning.

The expression " right, title and interest " occurs in the Code of 1859 and the meaning to be attached to it depends upon various circumstances. See *Veerabadra* v. *Marudaya Nachiar.*[2]

In *Soorappa Nayani* v. *Errappa Naidu*[3], their Lordships held that the entire interest in the Zamindari passed to the purchaser notwithstanding the fact that the expression used was 'right, title and interest alone."

The learned Vakil then referred to the various circumstances pointing to this pressure on the estate, the prior mortgages and in the litigation in connection with the estate, which shew that the entire interest passed.

The Court delivered the following.

Judgments :—*Miller* J.—I agree with the judgment which my learned colleague has prepared and will now deliver.

Abdur Rahim J :—The appellant as plaintiff in the suit seeks to recover the Pavali Zamin,a small impartible Zamindari which belonged to his ancestors and was sold in1869 at a court auction during the life time of his father and purchased by one Chidambaram Chettiar the 1st Respondent's father. It was in execution of a decree obtained by Chidambaram Chettiar himself in a suit (O. S. No 10) of 1866 that the sale took place. The plaintiff's father died on the 24th January 1894 and the present suit was instituted on the 23rd January 1906 just on the last day of the 12 years since the plaintiff's father's death. The Subordinate Judge having found on the main issues on the merits against the plaintiff dismissed the suit. By the 3rd issue the plaintiff raised the contention that the Zamindari in question was inalienable by custom but the finding of the Subordinate Judge on this point which is against the plaintift has not been contested before us. It could not be and has not been disputed that the debts to satisfy which the sale took place were binding on the last Zamindar, and as the alleged custom of inalienability has not been established, there can be no doubt that the Zamindari, of which the plaintiff's father was the full owner according to the law as well settled in this Presidency by the Pittapur case *Sri Raja Rao Venka-*

1. (1879) L. R. 1 I. A. 321. 2. (1910) I.L.R. 34 M. 188 at pp. 200, 201.
3. (1906) I. L. R. 29 M. 484.

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tasurya Mahipati Ramakrishna Rao Bahadur v. *The Court of Wards*[1] following the decision in *Sartaj Kuari's* case[2] was liable to be sold absolutely in execution of the 1st defendant's father's decrees. The whole of the argument, therefore, addressed to us by the learned Vakil for the appellant is concentrated on the question—'what was in fact sold under the decree? He contends that what was sold was not the entire proprietary interest of the Zemindar which he actually possessed in the Zemindari but a mere life interest. The argument is that the decisions of this court shewed that the law as interpreted in this Presidency up to 1860 was that an impartible Zemindari was inalienable except during the Zemindar's life and as under the sale certificates 'the right, title and interest' of the plaintiff's father was the subject of sales we must presume that what was intended to be sold was the Zemindar's life interest. He has also contended that the debts embodied in this decree in O. S. No. 10 of 1866 have not been incurred for proper or necessary purposes and that the doctrine that a Hindu son was liable for the debts of his father which were not shewn to have been incurred for illegal or immoral purposes had no vogue in this Presidency until 1881 *i. e.*, long after the sale in question in this case—when a Full Bench of this court *Ponnappa Pillai* v. *Pappuvayyangar*[3] held that the principle of the Privy Council ruling in *Girdhari Lal's case*[4] was applicable.

In dealing with these contentions we must bear in mind that as pointed in *Abdul Aziz Khan* v. *Appasami Naicker*[5] the question what the Court intended to sell and what the purchaser understood that he bought is one of fact or rather of mixed law and fact and must be determined according to the evidence in the particular case and as observed in *Veerabadra Aiyar* v. *Marudeya Nachiar*[6] in investigating this question the Court is not confined to any one fact. What is to be gathered from the numerous decisions on the subject which are summarised in the last mentioned case is that the character of the debt the terms of the sale certificate which formed the contract of the parties, the law as interpreted at the time of the sale, the frame of the suit, the judgment and decree, the execution proceedings, the advertisments for sale, the adequacy or inadequacy of the purchase money and the conduct of the parties are all circumstances which may legitimately be considered in an inquiry of this nature and no single circumstance can be regarded as conclusive by itself.

1. (1898) I. L. R. 22 M. 383.
2. (1888) I. L. R. 10 A. 272 s. c. L. R. 15 I. A. 51.
3. (1881) I. L. R. 4. M. 1.
4. (1879) L. R. 1 I. A. 321
5. (1901) I. L. R. 27 M. 131 at p. 141.
6. (1910) I. L R. 34 M. 188 at 205 and 206.

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As regards the state of the law in this Presidency in 1869 it was undoubtedly held by the Courts that a holder of an impartible Zemindari was not its full owner and did not possess absolute powers of alienation. This interpretation of the law prevailed down to 1889 when in *Beresford* v. *Rama Subba*[1], *Muthusami Aiyar* and *Wilkinson* JJ. felt themselves bound by the ruling of the Judicial Committee in *Sartaj Kuari's* case[2] which laid down the law otherwise. But it is not shown to have been the law in this presidency that the Zemindar for the time being had no powers of alienation under any circumstances, that is to say, he had not the same powers of disposition over the *corpus* of the estate as the head of an ordinary joint Hindu family governed by the Mitakshara. In *Beresford* v. *Rama Subba*[1] the learned judges observe "Thus, the principle which hitherto guided the courts in this presidency as supported by the observation of the Judicial Committee has been this—that when any estate is shown to be impartible by custom, the general law is superseded only to the extent of excluding the right of partition and of joint enjoyment and the *Mitakshara law governs the disposing power of the co-parcener in sole possession over the corpus of the estate.*" But this view was overruled by the Privy Council in the case of *Sartaj Kuari* v. *Deoraj Kuari*.[2] When the applicability of the decision in *Sartaj Kuari's* case [2] was questioned before the Judicial Committee of the Privy Council in the *Pittapur case* [3] on the ground that in the Madras Presidency a general custom of inalienability of impartible Zemindaries existed apart from the law of the Mitakshara as evidenced by a long series of decisions, their lordships reviewed all the cases down to *Beresford* v. *Rama Subba*[1] and came to the conclusion that this custom now relied upon did not modify the law. It had no force independently of the law." In commenting on the prior decisions of the Madras High Court *Rajah Enoogunty Sooriah* v. *Rajah Venkata Niladri Rao*,[4] *Visvani Ramayya* v. *Vahidally Bag* [5], *Sree Sree Ramachandra Sur Harischandra* v. *Jagannada Gajapati Narayana Deo* [6], *Subrayulu Naick* v. *Rama Reddi* [7], *Malavaraya Nayanar* v. *Oppayi Ammal*[8], *Narayana Deo* v. *Harischandra Deo*[9], *Chintalpati Chinna Sundar Raj* v. *Zamindar of Vizianagaram*[10], *Gowri Devamma Garu* v. *Ramanondara Garu*[11] and *Periyasami* v. *Saluckai Thevar*[12], all of which except the last

1. (1889) I. L R. 13 M. 197.
2. (1888) I. L. R. 10 A. 272.
3. (1898) I..L. R. 22 M. 383. (P. C.)
4. (1882) 3 Knapp. 27.
5. (1849) Madras Decisions S. A. 51,
6. (1861) Madras Decisions S. A 162.
7. (1863) M. H. C R. 141.
8. (1863) 1 M. H. C. R. 349.
9. (1863) 1 M. H. C. R. 455.
10. (1864) 2 M. H. C. R. 128.
11. (1870) 6 M. H. C. R. 93.
12. (1875) 8 M. H. C. R. 157.

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two cases proceeded upon the terms of Regulation XXV. of 1802, their Lordships with reference to the view expressed by Holloway J. in *Chintalapati Chinna Sundari Raj* v. *Zamindar of Vizianagaram*[1], upon which much reliance has been placed by the learned Vakil for the appellant as shewing that the law at the time was that a Zamindar had no power of alienation beyond his lifetime observe: "In that it was held by the High Court of Madras that the ratio *decidendi* of all the cases down to the latest cases clearly was that a Zamindari under the permanent settlement had really an estate analogous to an estate-tail as it originally stood upon the statute *Deo Donis*. This was introducing in the law of the Madras Province what is said in *Jatindra Mohan Tagore* v. *Gnanendra Mohun Tagore*[2], to be a novel mode of inheritance inconsistent with Hindu Law." These observations of the Judicial Committee are conclusive to show that the law of this Presidency was not even in the earlier days that a Zemindar's estate was analogous to an estate tail as it originally stood upon the statute *Deo Donis*, as was wrongly stated in the case reported in *Periyasawmy* v. *Saluckai Thevar*[3]. Besides neither in that case nor in any other decision of that period as I read them does it appear to have been held that apart from the enactment embodied in Regulation XXV of 1802 a Zamindar holding an impartible Zamindari could not for legitimate family or other necessary purpose make an alienation binding upon his successor. On the other hand in *Gowri Devamma Garu* v. *Ramanandora Garu*[4], was laid down with reference to impartible Zemindaries that "the unity of the family right to the heritage was not disserved any more than by the succession to co-parceners to partible property, but the mode of its beneficial enjoyment was different" (p. 105) and in *Periasami* v. *Saluckai Thevar*[3] it was distinctly stated at (p. 177) that 'he (the Zemindar) should be regarded as possessing only the qualified powers of disposition of a member of a joint family with such further powers, or it may be with such restrictions, as spring from the peculiar character of his ownership and that these powers fall short of a right of absolute alienation of the estate." Then as to what is the exact nature of a Zemindar's estate in an alienable Zemindari according to these decisions the Judicial Committee observed that there was a remarkable divergence of views in these judgments which deprived them of much authority (The *Pittapur case*,[5]) In *Abdul Azizkhan* v. *Appasami Naick*[6] the Judicial Committee was again called upon to declare what was the law with respect to

1. (1864) 2 M. H. C. R. 128.
2. (1872) L.R.I.A. Sup. Vol. 47 at p. 74.
3. (1875) 8 M. H. C. R. 157.
4. (1870) 6 M. H. C. R. 93.
5. (1898) I.L.R. 22 M. at p. 395.
6. (1901) I. L. R. 27 M. 131.

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impartible Zemindaries before 1889 and they say at page 142 "As regards the law of the matter in 1873-76 when the sales took place it was the accepted law in Madras that the holder of an impartible Zemindari who was himself a member of an undivided family could not alienate or incumber the *corpus* of the estate so as to bind his co-parceners except for justifiable or especial causes. Prior to 1889 there had been a series of decisions to this effect in the Madras courts but in that year following the judgment of the Judicial Committee in the case of *Sartaj Kuari* v. *Deoraj Kuari*[1] the High Court of Madras overruled those decisions. *Beresford* v. *Rama Subba*[2]. This leaves no room for doubt in the matter but it is suggested on behalf of the appellant that their Lordship's statement refers to the period between 1869 to 1873 and not to the state of the law in 1869. It is however clear that the Judicial Committee did not mean to confine the scope of their observations to that period and that there is nothing to support this suggestion that there was a radical difference in the interpretation of the law during that period and what preceded it, to the effect that up to 1869 the law was that a Zemindar of an impartible Zemindari in this Presidency could not according to the Hindu Law alienate the *corpus* of the estate even for such causes as would justify an alienation by the manager of a joint family that the law was the reverse of this since 1869. The decision of the High Court in *Gouri Devamma Garu* v. *Ramanandara Garu*[3] was in 1870 and if that was not quite in accord with the cases referred to in 1 and 2. M. H. C. Reports all that could be said was that there was a difference of views about that period as to the rights generally of a holder of a Zemindari and not that it was the established interpretation of the law in 1869 that he could not make an alienation even for 'justifiable especial causes.' The proper conclusion then, as already stated, is that in 1869 the law was that the Zemindar was not possessed of absolute powers of disposition over the *corpus* but that apart from the necessity of conforming to the requirements of any special regulation such as Rgulation XXV of 1802, he was like any other head of a co-parcenery, competent to bind the estate by debts incurred or alienations made for purposes which are regarded by the Mitakshara law as proper and justifiable. It is then contended that in any case in 1869 the law in this Presidency was not that a Hindu son was bound to pay his father's debts unless he could show that they were incurred for illegal or immoral purposes and that this proposition established by *Girdhari Lal's case*[4] in 1874 was not adopted in Madras until the

1. (1888) I. L. R. 10 A. 272.
2. (1889) I. L. R. 13 M, 197.
3. (1870) 6 M. H. C. R. 93.
4. (1874) L. R. 1 I. A. 321.

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Full Bench Decision in *Ponnappa Pillai* v. *Pappuviengar*[1]. The Privy Council had to consider the question in the *Sivagiri case*[2] and their Lordships observe that the doctrine laid down in *Girdhari Lal's case*[3] was not new but supported by previous decisions and they held that there was no ground for the opinion that that case did not apply to the Madras Presidency. And when one looks to the Judgment of the learned Judges in the Full Bench case in *Ponnappa* v. *Papuviengar*[1] I do not think that it can be said to be clearly made out that the law in this Presidency was recognised by the courts to be different from what is stated to be the law in *Ghirdari Lall* v. *Kantu Lall*[3]. In *Ponnappa* v. *Papuviengar*[1] Chief Justice Turner observes (at p. 52) that he did not "understand the other learned Judges who felt themselves unable to accept the law declared by the Privy Council to assert the existence of any immemorial usage at variance with the law" and points out that no ruling of the Madras Court to the contrary was cited at the bar except a decision of Mr. Justice Muthusami Aiyar which was then under appeal to the Privy Council; that is the case it may be mentioned which was the subject of decision in the *Sivagiri's case*[2] already referred to. No doubt Mr. Justice Kindersley said that the cases of *Girdhari Lal* v. *Muddun Takur*[3] appeared to imply that the son was responsible for his father's debt even in the life time of the father and that this doctrine was new to this part of India. However that may be he does not say that the doctrine that the son was under obligation to pay his father's debt after the latter's death was not recognised in this Presidency. In any case even Mr. Justice Kindersley does not lay down that the law respecting the liability of a Hindu son for his father's debts was different here from that which obtained in the other Presidency and he points out that for many years there had been no decision here directly on the point. And in fact no decision has been cited to us which laid down the Law otherwise than as enunciated in *Girdhari Lal's*[3] case at the time of the sale in question in the present case. Further when the father occupies the position of the manager of the family—and in this case the plaintiff's father had at least that status if not something higher—the essential difference in the law with respect to the liability of the son as a co-parcener for his debts and that of any other co-parcener relates substantially to the onus of proof. In the case of the son the burden is on him of showing that the debt was incurred for illegal or immoral purposes while in the case of the other co-parcener the creditor has got to prove that the debt was incurred for proper or

1. (1881) I. L. R. 4 M. 6. 2. (1882) I. L. R. 6 M. 1.
3. (1874) L. R. 1 I. A. 321.

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necessary purposes. It is not necessary to determine in this case apart from the onus of proof the exact nature of the difference between a debt or alienation which is not shown to have been incurred for illegal and immoral purposes and a debt or alienation which is proved to have been contracted or made for a proper or necessary purpose because I have come to the conclusion that the debts which were paid off by money borrowed under Exhibit XIV were incurred by the plaintiff's father for necessary purposes. What I wish to point out here is that the doctrine enunciated in *Girdhari Lal's* [1] case in so far as we are concerned with it in this case is one relating to the question of onus of proof, and such a question is obviously one to be determined only at the time of trial; so even if it were the fact that at the time of the sale of this Zemindari the onus was upon the alienee to make out that the alienation was made for a binding purpose that cannot effect the way in which the matter was to be tried at the date of this suit. The clear outstanding facts are that the plaintiff's father at the very outset had to incur the expenses of a heavy litigation to secure possession of the Zemindari and for that purpose contracted debts of a very large amount and when he did at last recover the Zemindari he apparently recovered very little—if any thing at all in the shape of mesne profits. As a result of the suit for possession he had to grant a long lease of it for a very small rent. Then he either instituted other suits himself or had to defend suits instituted by other persons and the expenses of all these suits along with the expenditure on the occasion of marriages in the family including his own after his first wife's death and those of his brothers and daughter, considerably swelled the debts he had to incur at the very beginning of his career. These debts are proved by bonds and razinama decrees passed on bonds executed by him to the different creditors. All the papers connected with those decrees are not available at this distant date, but as found by the subordinate judge there is evidence as I have already stated, shewing that the debts were borrowed under pressure of necessity. At the date of Ex. XIV which is the simple bond executed on the 18th August 1863 in favour of Venkatachellam Chettiar by the plaintiff's father the debts amounted to Rs. 49,000 and it was with this sum for which Ex. XIV was executed that the previous debts were discharged. It is suggested that the plaintiff's father was not right in instituting or defending many of the suits in which he was engaged and which ultimately resulted in decrees against him. But in the first place the materials before us do not enable us to come to any definite conclusion on the point; and in the

1. (1879) L. R. 1 I. A. 321.

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next place if the plaintiff's father unwisely or imprudently engaged in certain litigations, or if he was somewhat extravagant in expenditure in connection with the marriages, that is to say, if the debts most of which were evidenced by razinama decrees were to any extent the result of imprudent mismanagement it could not be said that Venkatachellam Chettiar the predecessor-in-title of the present defendant who advanced the money to discharge those debts was under an obligation to inquire to what extent the debts could by proper management have been arrived if as there can be no doubt those debts constituted a pressing demand which had to be met. It has not been shown that the Zemindar could have paid off his liabilities out of the income of the Zemindari. In the usual course of procedure in those days a razinama decree was obtained on Ex. XIV by which the Zamindari was mortgaged to the plaintiff for Rs. 51,000 and odd which included a sum of Rs. 1715 for interest and costs in addition to the sum of Rs. 49,000 mentioned in Ex. XIV. The plaintiff attempted to show that his father was addicted to vices and that some of the debts at any rate were incurred for making large presents to nautch girls and in connection with cock and ram fights. But I agree with the subordinate judge that though it is possible that the plaintiff's father's character was not all that was desirable there is really no evidence to connect his debts with necessities arising out of vicious and immoral indulgences. In this connection I may say that the estimate of the Subordinate Judge of the income and value of the property is not shown to be wrong. That matter is dealt with in paragraphs 63 and 64 of the judgment. The finding of the Subordinate Judge that the net income of the Zamindari at the time of the sale in 1869 was not more than about Rs 55,000/-is amply justified by the evidence and is not in fact seriously challenged. The Zamindari was sold for Rs 97,000 and having regard to the fact that lands have since then gone up very much in value and the prices obtained at the time for similar lands in the Zamindaries in the neighbourhood, there can be no doubt that that figure would represent the proper value of the full and absolute interest in the Zamindari supposing that was what was sold. Now the debts having been incurred for necessary purposes and the law at the time being that the absolute interest in the Zamindari was liable to be sold for such debts, the only question is what was in fact sold. The sale price as I have said was equal to the full value of the Zamindari and the sale took place in execution of a mortgage decree by which the entire Zamin was liable to be sold and not merely an interest terminable with the life of the Zamindar and if we look at the proceedings in execution they also

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show that it was the absolute interest in the Zamin that was put up for sale as is apparent from accounts of attachment and sale proclamation (Ex. XVII and XVII-A). With regard to the oral evidence on the plaintiff's side as to what is alleged to have been said of the officers of the court and other persons at the time of the sale there can be no doubt that the Subordinate Judge was right in refusing to act upon it.

Much reliance is placed by the learned pleader for the appellant upon the fact that the sale certificate Ex. XVIII mentions that the right, title and interest of the defendant in the *Zemindari* is sold as indicating that only his life interest was sold. It has been repeatedly pointed out that such a description is not inconsistent in any way with the sale of all the interest which the debtor had power to dispose of under given circumstances. See *Abdul Aziz Khan* v. *Ayyasawmi Naicker*.[1] I may also mention that it is proved by evidence that in 1869 apart from the decisions of the courts sale of Zamindari lands was not in fact confined merely to an interest terminable with the life of the Zemindar for the time being. There we have it that the debts which led to the sale were incurred for necessary purposes and the *corpus* of the Zemindari was liable to be sold for such debts in 1869 when the sale actually took place. By the Razinama decree passed on the bond Ex. 14 by which previous debts were paid off the absolute interest in the Zemindari was hypothecated and made liable to sale. The execution proceedings show that such interest and not merely an interest limited to the life of the Zemindar was attached and notified for sale and the price paid was the full value of the Zamindari supposing that the absolute interest in it was sold. These facts are to my mind conclusive to show that what was in fact sold was the entire interest in the Zemindari. It is not therefore necessary to consider whether S. 373 of C. P. C. would be a bar to the suit because the plaintiff had instituted in his father's life time another suit asking for a declaration that the sale did not effect his interest, and when withdrawing the suit he did not obtain permission of the Court to institute another suit But I may say that in my opinion the present suit is based on substantially a different cause of action the plaintiff being now, if his allegations were made out entitled to the possession of the Zemindari while in the lifetime of his father his only interest was sufficient to sustain the suit though I do not express any definite opinion on the point.

The Judgment of the learned subordinate Judge must be confirmed and the appeal dismissed with costs.

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1. (1901) I. L. R. 27 M. 131 at 141.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

The Public Prosecutor ... ... *Appellant.**

v.

Sadananda Patnaik ... ... *Accused.*

Criminal Procedure Code—Sessions Division—Ganjam Agency—Forum of appeal from decision of first class Sub Divisional Magistrate exercising power in agency and non-agency tracts.

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The Magistrates of the Agency District of Ganjam are not, as such, in any way, subordinate to the Sessions Court of the non-agency. Nor does the fact that the same person is a first class Sub-Divisional Magistrate in both the agency and non-agency Districts make him, subordinate to the Sessions Court of the Ganjam Sessions Division in regard to the Magistrate's Jurisdiction in the Agency District.

The proper forum of appeal in a criminal case from the decision of a first class Sub-Divisional Magistrate in the Ganjam District in a case which arose within the agency tracts is the Session Judge of the agency Sessions Division *i. e.*, the District Magistrate and not the Sessions Division of the Ganjam non-agency tracts.

The terms "Deputy Magistrates" and "General Deputy Magistrates" are titles unknown to the Code of Criminal Procedure.

The advisability of officers bearing in mind the several capacities in which they act from time to time and also of the Government bearing the distinction between the agency and non-agency districts in the judicial use of the term in issuing notifications pointed out.

Appeal under S. 417 of the Code of Criminal Procedure from the Judgment of acquittal passed on the accused in the Criminal Appeal 13 of 11 by the Sessions Court of Ganjam Agency in (C. C. No. 2 of 1911) on the file of the Dy. Magistrate of Gumsoor Division.

T. V. Seshagiri Aiyar amicus curiae.

Public Prosecutor (*C. F. Napier*) for appellant. Act XXIV of 1839 Ss. 3 and 8 make it clear that the Agency tracts are cut off from the District of Ganjam. The notification by the Government at pp. 232 and 239 of the Local Rules and Orders (1906)–vol. 1 (1906 Edn.) makes it also clear that the Agency Tracts forms a separate Sessions Division. A Sessions Division consists of one or more Districts. There cannot be more than one sessions division within one Judicial District. (S. 7 Cr. Pr. Code). The Code of 1861 contains a definition of District Magistrate but not of District or of Sessions Division. For the first time the definition was introduced by the Act of 1882. Before that there were Revenue districts containing 2 Sessions Divisions. But when S. 7 Cr. Pr. Code says the

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* Cr. A. No. 119 of 1912. 21st November 1912.

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old Sessions Division and districts are retained what is meant cannot be Sessions Divisions and Revenue Districts. *Valia Ambu Poduval* v. *Emperor*,[1] overlooks the distinction between Revenue District and Judicial District. Even if this case is to be accepted good law, in this case, the agency tract has long been regarded a different District and there is no justification for the view that the judgment of the Magistrate in his capacity as agency officer is open to appeal to the Sessions Judge of Ganjam, because that officer has his head quarters within the local limits of the jurisdiction of the Sessions Judge. There is no force in the argument that the agent is both District Magistrate and Sessions Judge. There is no difficulty by the combination, in the actual working. The agent never tries cases himself. The appeal from the Magistrate of the District is to the Sessions Judge of the sessions division.

T. V. Seshagiri Aiyar relied upon the schedule to Scheduled Districts Act, the notification of the Government dated 29-12-1910, and the notifications at p. 249 of the Local Rules and Orders vol. 1 to show that the agency tracts still form a part of the Ganjam District.

Cur ad vult.

The Court delivered the following.

Judgment:—The facts of this case so far as they are necessary to state them for the purposes of this appeal, are as follows:—

One Sadananda Patnaik was convicted by the 1st class Magistrate of the Gumsoor Sub. Division, Ganjam, of an offence punishable under S. 161 I. P. C. On appeal the Sessions Judge of the Ganjam Session Division acquitted him. Against this acquittal the Public Prosecutor appeals on behalf of Government on the ground that the Sessions Judge of the Ganjam Sessions Division had no jurisdiction to entertain the appeal. The offence was committed at Baliguda which is in the Ganjam Agency tracts. The case was transferred by the Agent to and was tried by the 1st class Magistrate of the Gumsoor Sub. Division who had local Criminal jurisdication over certain Agency tracts as well as over certain non-Agency tracts. The argument for the appellant is that the Agent transferred the case to the 1st class Magistrate for trial in his capacity as a 1st class Magistrate of the Agency, not as a first class Magistrate of the non-agency portion of his Sub-Division, and that an appeal lies from his decision as an Agency Magistrate to the agent as Sessions Judge of the Agency tracts but not to the Sessions Judge of the Ganjam Sessions Division.

1. (1906) I. L. R. 30 M. 136.

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We think that this contention must be upheld. By S. 3 of Act XXIV of 1839 the administration of civil and criminal Justice and the collection of revenue in certain specified tracts, (which for convenience may be called the Agency tracts), which were at that time included in the District (*i. e.*, the revenue District) of Ganjam, were vested in the Collector of Ganjam, and it was ordered that his powers in these matters should be exercised by him as agent to the Governor of Fort Saint George who was given power (S. 4) to make rules for the guidance of the Agent and his subordinate officers and also (S. 8) to alter the limits of the Agency tracts.

By Notification dated 28th July 1843 (see page 165 of Vol. I Madras Local Rules and Orders) issued under the authority of S. 1 of Act VII of 1843 the then existing civil and Criminal Courts throughout the Presidency of Madras (with certain exceptions) were abolished and new Courts called Zillah Courts were established (S. 3) presided over by a civil and sessions Judge of a Zillah. The general scheme (S. 6) provided for a. Zillah Court for each collectorate, but in regard to the collectorate of the Ganjam it was provided that the Jurisdiction of the Zillah and Sessions Court at Chicacole (a town in the Ganjam collectorate) should extend over such parts of the collectorate of Ganjam as have not by Act XXIV of 1839 been withdrawn from the operation of the general regulation.

Under the power given by S. 4 of the Act of 1839 certain rules for the administration of justice and the collection of Revenue in the Agency tracts were promulgated (see page 232 of vol I Madras Local Rules and orders). In 1861 the first Code of Criminal Procedure was passed (Act XXV of 1861). It enacted (S. 14) that "the words 'Magistrate of the District' shall mean the chief officer charged with the executive administration of a District in criminal matters by whatever designation such officer is called" and also (S. 18) that the local jurisdiction of the Magistrate of a District, shall, for the purposes of this Act, be deemed a "District" and the local jurisdiction in a particular part of a District vested in a Magistrate other than the Magistrate of the District shall be deemed "a Division of a District." The Code came into force in the non-agency portion of Ganjam on the 1st January 1862. From that date the agency portion and the non-agency portion must be regarded as separate Districts for the purposes of the Code of Criminal Procedure. By notifications dated 29th January and 17th Feby. 1862 under S. 445 of this Code its operation was extended to the Agency tracts of Ganjam and Vizagapatam respectively. By Notification dated the 6th January 1863 (See page 239 of vol I Madras Local

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Rules and Orders) so much of the rules framed under Act XXIV of 1839 as related to criminal justice was cancelled and the 'Agent in Ganjam" was in the Agency tracts "authorised to exercise the powers of a Sessions Judge in addition to those belonging to a Magistrate of a District under the Code of Criminal Procedure." The result of these various enactments, notifications and rules was that the old Collectorate of Ganjam was divided for the purposes of administration into two areas *viz.*, the Agency tracts and the non-Agency (or Regulation) tracts. Different sets of laws and regulation or rules were in force in these two tracts, though for convenience the same officers were usually appointed to administer the laws and conduct the administration in both tracts simultaneously. The person who was Collector exercised the chief revenue functions as Collector in the non-Agency tracts, and as agent of the Governor in the Agency tracts and he was also District Magistrate of both areas. Each area was for Magisterial purposes a separate District just as each area was a separate Sessions Division in one of which (the agency tracts) the Collector, in his capacity as Agent, was also Sessions Judge, while in the other (*i. e.*, the non-Agency tracts) there was a separate Zillah and the Sessions Judge sitting at Chicacole. It is unnecessary to refer to the Criminal Procedure Codes of 1872 and 1882. By S. 6 of the Scheduled Districts Act, 1874, the Local Government was authorized from time to time.

(*a*) to appoint officers to administer *inter alia* Criminal Justice in the scheduled Districts which included the Agency tracts of Ganjam,

(*b*) to regulate the procedure of such officer, and

(*c*) to direct by what authority any Jurisdiction should be exercised, and by S. 7 of the Act all these existing rules prescribed by the Governor-General in Council or the Local Government for the guidance of officers appointed for any of the purposes mentioned in S. 6 were continued in force, and all existing officers were deemed to have been appointed under S. 6.

By Notification dated 4th July 1898, issued under S. 3 of the Act of 1874, the Criminal Procedure Code of 1898 was declared to be in force in the Agency tracts of Ganjam (See page 64 to 66 vol. I, Madras Local Rules and Orders). By S. 7 (3) of that Code the then existing Sessions Divisions and Districts were continued and by S. 8 (2) all the then existing Sub-Divisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code."

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We thus see, as already stated that for Magisterial as well as for Judicial and Revenue Administration, the old Ganjam Collectorate was long ago divided into an Agency District and a non-Agency District and the Agency District is also a Sessions Division the Session Judge of which is the Agent himself. The Non-Agency District is, for the purposes of the Code of Criminal Procedure quite distinct from the Agency District, though the same person is the District Magistrate of both. In the same way the Gumsoor Sub-Division consisting as it does of a part of the Agency District and of a part of the Non-Agency District, must for the purposes of the Code, be regarded as consisting of two Sub-Divisions though the same First class Magistrate has jurisdiction in both. When the District Magistrate transferred the present case from the Agency Magistrate in whose local jurisdiction it originated he could only do so as District Magistrate of the Agency District, and he must be held to have transferred it to the Gumsoor Sub-Divisional Magistrate as Sub-Divisional Magistrate of the Sub-Division in the Agency District though this does not specifically appear in the order of transfer. The Sub-Divisional Magistrate, however, appears to have been conscious of the true position, since he numbered the case as "Agency calendar case 2 of 1911" and it may also be noted that the Agency Magistrate in whose jurisdiction the case arose, in asking the District Magistrate to transfer the case, asked him to transfer it to the " " Agency Deputy Magistrate, Russelkonda " that is in other words, to the Sub-Divisional Magistrate of Gumsoor, (whose head-quarters are at Russelkonda) in his capicity as a first class Sub-Divisional Magistrate of the Agency District. The Magistrates of the Agency District are not, as such, in any way, subordinate to the Sessions Court of the Non-Agency Sessions Division of Ganjam; nor does the fact that the same person is a first class Sub-Divisional Magistrate in both Districts, make him subordinate to the Sessions Court of the Ganjam Sessions Division in regard to the Magistrate's jurisdiction in the Agency District. The decision in *Valia Ambu Poduval* v. *The Emperor*[1] relied by the Sessions Judge in the present case is not in point since it expressly provided on the footing that, notwithstanding the language of S. 7 of the Criminal Procedure Code, there were in that case two Sessions Divisions in the same District. We must, therefore, hold that the Sessions Judge in the present case had no jurisdiction to hear the appeal which should have been made not to him, but to the Agent. We must allow the appeal and set aside the acquittal. On the merits, however,

1. (1906) I. L. R. 30 M. 136.

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we think the decision of the Sessions Judge was right, and the Public Prosecutor has not thought it necessary to argue in support of the conviction. As a Court of revision we set aside the conviction by the Magistrate.

We may add that it would be well if the District and the Sub-Divisional Magistrates in the Agency and the non-Agency Districts of Ganjam, would, in future, bear in mind their several capacities with references to the language of the Code of Criminal Procedure and indicate clearly on the face of their proceedings the capacity in which they act from time to time.

In the present case the first class Magistrate of the Gumsoor Sub-Division is referred to by the Special Assistant Agent as "the Agency Deputy Magistrate Russelkonda," by the District Magistrate as the "General Deputy Magistrate Gumsoor" and by the Magistrate himself as the "Deputy Magistrate Gumsoor Division"—"Deputy Magistrate" and "General Deputy Magistrate;" these, we may point out are titles unknown to the Code of Criminal Procedure.

It would also be well if the distinction between the Agency and Non-Agency Districts in the Judicial use of the term is borne in mind in the Notification of Government.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Raja Kumara Venkata Perumal Raju Bahadurvaru Rajah of Karvetngar, minor by guardian W. A. Vardachariar — *Appellant Counter Petitioner**

v.

Audikesavalu Reddi and other. — *Respondents (Pititioners)*

Limitation Act art. 182—Mortgage decree for sale—Execution—Date of final decree.

Limitation for the execution of a mortgage decree for sale runs only from the date when the first decree or decree *nisi* for sale is made absolute.

Venkata Perumal Raju v. Audikesavalu Reddi.

Appeal from the order of the District Court of North Arcot in Civil Execution Petition No. 84 of 10 in O. S. No. 10 of 1890.

L. A. Govindaraghava Aiyar for appellant.

C. V. Anantakrishna Aiyar and *K. C. Desikachariar* for respondents.

The Court delivered the following

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*A. A. O. No. 269 of 1911. 13th November 1912.

Venkata Perumal Raju v. Audi-kesavalu Reddi.

Judgment:—The decree in plaintiff's favour was made absolute only on the 1st March 1899. The present application was put in within 12 years from that date. According to the decision of the Privy Council in *Ashfag Husain* v. *Gaur Sahai*[1] limitation for the execution of a decree for sale in a suit on a mortgage, would run only from the date when the first decree or decree *nisi* for sale is made absolute. This view was adopted by this Court in C. M. S. A. 86 of 1910. The application is therefore not barred. According to the terms of the decree the plaintiff is entitled to proceed in execution against other properties of the judgment-debtor.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar.

Rajagopala Pandarithar, minor represented by his next friend Anni Ammal ... ... *Petitioner* (Plaintiff.)*

v.

Muthukumara Chettiar ... *Respondent* (Defendant.)

Jurisdiction, inherent—Order for personal appearance—Next friend's disobedience—Minor—Practice—Procedure.

Anni Ammal v. Muthu-kumara Chettiar.

A Court has jurisdiction to direct the personal appearance of parties at any stage of the case even in the absence of specific provisions in the Code; but a Court has no power to visit the disobedience of a next friend of a minor plaintiff to the court's order to appear, on the minor himself, and to dismiss the suit on that account.

A next friend of a minor plaintiff is a "party" to the suit only in a limited sense of the term.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Tanjore in O. S. No. 65 of 1908.

S. Srinivasa Aiyangar, *T. V. Gopalasawmi Mudaliar* and *G. Krishnasawmy Aiyar* for petitioner.

T. R. Venkatarama Sastri and *G. S. Ramachandra Aiyar*, for respondent.

The Court delivered the following

Judgment:—The District Munsif dismissed the suit for default under O. 9 R. 12 because the minor plaintiff's next friend did not appear in person when ordered to do so.

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*C. R. P. 555 of 1909. 18th November 1912.

1. (1910) I. L. R. 33 A. 264.

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I do not agree with the Petitioner's Vakil that the court has no power to order a party to appear in person except when empowered by specific sections found in the Civil Procedure Code. I think the Court must have such power whenever it considers that the interests of justice require any party to appear in person at any stage of the case.

But the Court has no power under O. 9 R. 12 to dismiss a minor's suit for default because of the disobedience of his next friend. The next friend is not a party to the suit (see *Collector of Trichinopoly* v. *Sivarama Krishna Sastrigal*,)[1] though for purposes of answering interrogatories or for saddling him with costs, he might be treated as a party. He should not be treated as a party in order to visit his obedience to the court's orders upon the minor plaintiff and so as to prevent the minor plaintiff from appearing further in the suit through the Vakil already appointed for him or through some other next friend who might be appointed after removing the disobedient next friend.

I, therefore, set aside the Munsif's order dismissing the suit for default and direct the suit to be restored to file and disposed of according to law. Costs to be costs in the cause.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Arnold White, Chief Justice and Justice Sankaran Nair.

N.P.L.N.K.R. Kanniappan Chetti — (*Petitioner. Appellant* in O. S. Appeal 74 on the file of the High Court appellate Juirsdiction.

v.

P. R. Manikavasagam Chetti — *Respondent* Do.

C. P. C. O. 41, rr. 6. 12. 5, Court to which application for stay of sale should be made.

Kanniappan Chetti v. Manika-vasagam Chetti.

An application for stay of sale of immoveable property should be made only to the Court which passed the order for sale.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to stay (1) the sale of the appellant's immoveable properties advertised for the 11th Nov. 1912 in the Court of the Sub-Judge at Ramnad at Madura till the further orders of this Court; (2) all proceedings in execution of the decree of the High Court in its Ordinary Original Civil Jurisdiction in O. S. No. 160 of 1911 pending disposal of O. S. A. No. 74 of 1912 preferred therefrom to the High Court, Appellate Jurisdiction and to issue an order that the costs of this application be costs in the appeal.

C. M. P. 2334 of 1912. 18th November 1912.

1. (1899) I. L. R. 23 M. 73 at p. 81.

Kanniappan Chetti v. Manikavasagam Chetti

C. E. Odgers instructed by *Grant and Greatorex* for petitioner.

A. Krishnasami Aiyar for *C. P. Ramaswami Aiyar* for respondent

The Court made the following:—

Order:—In this case the notice of motion asks for an order "that the sale of the appellant's immoveable properties advertised for the 11th Nov. 1912 in the Court of the Sub-Judge of Ramnad at Madura be stayed till the further orders of this Court and that all proceedings in execution of the decree in O. S. No. 160 of 1911 dated the 20th Sep. 1911 be stayed against the appellant pending the disposal of this appeal and for such other orders as this Hon'ble Court may deem proper and necessary in the circumstances of this case and for an order that the costs of this application be costs in the appeal."

A preliminary objection has been taken that under Rule XII 6 (2) the application should be made to the court which made the order for sale, *i.e.*, in this instance to the Sub-Judge's Court at Ramnad.

Mr. Odgers has contended that there is concurrent jurisdiction in the Subordinate Judge's Court and in this Court and he has referred to the English Rules of the Supreme Court order LVIII Rules 16 and 17. But the English Rules expressly provide for concurrent jurisdiction and no question could arise thereunder. The question for us is, did the Legislature intend, while giving the appellate court the general power conferred by Order XLI rule 5, to make special provision that an application for stay of an order for sale of immoveable property should be made only to the court which made the order.

In view of the alteration of the language in Order XLI Rule 6 (2) which re-produces the old S. 546 it seems clear that the Legislature intended that the application should be made only to the court which made the order. There were doubts as to whether the appellate court would make an order for stay of an order for the sale of immoveable property (see *Triveni Sahu* v. *Bhegwat Bux* [1]) and the language of the enactment would appear to have been altered to remove these doubts and to make it clear that the application must be made to the court which made the order for sale.

We think the preliminary objection is good and we must uphold it. We must dismiss the application for the stay of the order for sale for the reasons above stated and we must also dismiss the general application to stay proceedings in execution of the decree as it is not shown that there are any proceedings other than those under the order for sale. The costs of this application will be costs in the appeal.

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1. (1907) I. L. R. 34 C. 1037

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Justice Sundara Aiyar.

R. M. A. R. Arunachella Chettiar. ... *Appellant** (*Plaintiff*).

v.

V. V. M. Muthiah Chettiar and others ... ... *Respondents* (*Defendants*).

C. P. C. S. 16 Cl. (d)—Declaration that mortgage is not binding—Forum.

A suit for a declaration that a mortgage in favor of some defendants is invalid against plaintiff is governed by cl. (*d*) of S. 16. C. P. C.; and a Court having no territorial jurisdiction over the area in which the properties affected by the mortgages are situate has no jurisdiction to try the case.

Arunachella Chettiar v. Muthiah Chettiar.

Appeal from the order of the Court of the Subordinate Judge Ramnad in O. S. No. 121 of 1910.

T. Rangachariar, C. S. Venkatachari and *A. Srinivasa Aiyangar* for appellant.

T. Narasimha Aiyangar, C. V. Anantakrishna Aiyar, and *P. Gangadhara Aiyar* for respondents.

The Court delivered the following:

Judgment:—For the purpose of deciding this appeal it is sufficient to refer to the 3rd prayer in the plaint in which the plaintiff asks for a declaration that the mortgage executed in favour of the defendants Nos. 5 to 8 are invalid as against the plaintiff. As the properties affected by the mortgages are admittedly situated beyond the jurisdiction of the Sub-Court, it could have no jurisdiction to take cognizance of the prayer, because it clearly asks the Court to determine whether defendants No. 5 to 8 have an interest in immoveable property. The proviso to S. 16 C. P. C. has no application to such a case, as the relief is not one that can be rendered to the plaintiff by the personal obedience of the defendants. *Benodi Behari Bose* v. *Nistani Dassi* [1] is not in point. That suit was for administration in the High Court and was governed by the Letters Patent. The Privy Council held that the suit was not one for land beyond the original jurisdiction of the High Court. This suit clearly comes within clause (*d*) of S. 16 C. P. C. We dismiss the appeal with costs. We allow the memo of objections and direct the plaintiff to pay the defendant's costs in the Lower Court also. He will also pay the cost of the memo of objections.

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*C. M. A. 117 of 1911. 15th November 1912

1. (1905) I. L. R. 33 C. 180 at p. 191. P. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Mr. Justice Sadasiva Aiyar.

A. M. Chokalinga Mudaliar ... *Plaintiff Petitioner.**

v.

G. Mahomed Sheriff Saib and others *Respondents—Defendants.*

Chokalinga Mudaliar v. Mohomed Sheriff Saib.

Master and servant—Wages—Leaving service before expiry of period—Quantum meruit.

Both according to justice, equity and good conscience and the statutory law as embodied in Ss. 39 and 64 of the Contract Act a servant who quits his master's service in India before the expriry of the contract period is entitled to be paid for the full months he worked under the master less the damages incurred by the master by the breach.

Held that a servant who engaged himself to a period of one year at a monthly salary but who left his master's services ten days before the expiry of the year was entitled to his wages for the full eleven months he worked.

Petition Under Sec. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of the Nilgris, Ootacamand in Small Cause Suit No. 303 of 1911.

V. Visvanatha Sastri for petitioner.

R. Kuppusami Aiyar for respondents.

The Court delivered the following

Judgment:—The plaintiff is the petitioner in revision. He brought this Small Cause Suit in the Nilgri Subordinate Judge's Court for the salary due to him from 1st April 1908 to 20th March 1909 at Rs. 18/-a month or Rs. 216/-a year. His engagement was for one year from 1st April 1908 to 31st March 1909. The Subordinate Judge has found that the plaintiff left the defendant's service without justification on 20th March 1909. He also found that though the salary was fixed at Rs. 18/-a month, the engagement was for one full year and his salary was agreed to be payable in a lump sum of Rs. 216/-at the end of the year. On these findings he held that according to the rule of law established by English decisions and followed in *Dhumee Behara* v. *Sevenoaks*[1], the plaintiff lost all right to wages for the 11 months and 20 days during which he actually worked. The principle of the rule as stated in the English cases is that the contract must be deemed an entire indivisible contract and the performance of the services for the whole time agreed upon was in the nature of a condition precedent to the right to recover even a portion of the wages.

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*C. R. P. No. 229 of 1912. 7th November 1912.

1. (1886) I. L. R. 13 C. 80.

Chokalinga Mudaliar v. Mahomed Sheriff Saib.

"It is a general rule applicable to all contracts, that where the plaintiff has contracted to do an entire work for a specific sum, he can recover nothing unless the work be done or, it can be shown that it was by the defendant's default that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract."

The leading English case on this question is *Cutter* v. *Powell*[1]. That was the case of a sailor who agreed to serve as second mate for a sum of 30 guineas during the voyage of a ship between Kingston and Liverpool. He did duty as mate between 31st July 1793 and 20th Sep. 1793 but died during the voyage and before the ship's arrival at Liverpool. The suit was brought in *assumpsit* for work and labour done by the deceased. The suit was dismissed on the ground that no contract can even be implied making the master liable to pay on a *quantum meruit*. Lord Kenyon said that the contract was a "kind of insurance." The learned judges who decided the case also put it upon the custom of the commercial world. In the notes to that case also there are learned disquisitions as to whether suits in particular cases lie in *indebitatus assumpsit* or in *quantum-meruit* or in the case and so on. But the learning connected with the nature of the action to be brought is not of much use in these days. Two exceptions are mentioned to the general rule laid down the exception being (*a*) cases in which the special contract being unperformed a new contract has been implied from the conduct of the parties to pay a remuneration commensurate with the benefit derived from partial performance and (b) where the party to be made liable has absolutely refused to perform or has incapacitated himself from performing his side of the contract, the other party may treat the contract as rescinded and sue for what he has already done under it upon a *quantum-meruit*. So much for English Law. I am, however, strongly of opinion that in cases between masters and servants, Courts should not be too strict in treating the contracts of service for a certain period and for a certain wages as indivisible unless the nature of the services (like that of a sailor for a particular voyage or a servant engaged for domestic service during particular pilgrimage) raises a strong presumption that the servant was intended not to be entitled to claim wages for broken periods. Even in such cases if the servant was unable to perform his duty through illness or death, I would allow a suit for the value of work actually performed for the broken period. Courts in India are not always bound by the technicalities of English Law or even by the precedents established by English

1. (1795) 2 Smith's Leading Cases. vol. II. p. 1.

Chokalinga Mudaliar v. Mahomed Sheriff Saib.

cases. The Subordinate Judge in this case says that he "was at first surprised when the contention was advanced on behalf of the 1st defendant that the plaintiff was not entitled in law to any wages at all by reason of his having quitted the service of his employers" ten days before the stipulated period of one year had expired. He also says that the rule of English Law works great hardship in a case like the present one where the servant fell short of his year of service by only 11 days." Though there are some cases decided by the Bombay and Calcutta High Courts following the rule of English Law (See *Ramji Manorr* v. *F. D. Little*[1] and *Aryodaya S. & W. Co.* v. *Siva Virchand*[2] no Madras case has been quoted to show which follows the strict rule of English Law. Even in Calcutta I came across an old case in *Rughoonath Das* v. *T. Halle*,[3] where Norman C. J. and Ainslie J. refused to follow the rule of English Law. That was a case of a dismissed servant who sued for wages for the broken period during which he served. The defendant on the authority of English cases contended that the plaintiff could not demand his pay for the broken period but ought to have brought an action for wrongful dismissal. But the High Court held that the plaintiff was already entitled to payment for the time during which he had served according to the rate of wages he was earning when dismissed. The presumption of a yearly hiring is capable of rebuttal and it is necessary to consider the circumstances of each case in order to find out whether the presumption has been rebutted in that case. See Halsbury's Laws of England Vol. 20 p. 92. In England it seems to have been held that the question whether a contract of service for a term was indivisible or divisible might also be decided on the nature of the service. I am of opinion that in India where payments of wages are usually made monthly, Courts should be more ready than in England to hold that servants are entitled to wages for the full months at least during which they did service though in some particular cases, the servant might have agreed to take his wages at the end of the year. Of course the master who, where the servant breaks his contract before the end of the period for which he agreed to serve, has sustained damages owing to such breach of contract is entitled to claim the damages caused by the breach and to set off such damages against the wages claimed by the servant for the broken period. But to hold in India that the servant loses his entire wages because he left the service without cause a few days before the expiry of one year or to hold as in *Cutter* v. *Powell*,[4] that the servant's legal representatives cannot

1. (1886) I. L. R. 13 C. 80.
2. (1910) 13 Bom. L. R. 19.
3. (1871) 16 W. R. 60.
4. (1795) 2 S. L. C. Vol. I. p1.

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recover even single pie because the servant died before the expiry of the year would, in my opinion, be against justice, equity and good conscience. Even taking the question as a pure question of law Indian courts are bound by the provisions of the Contract Act in all these matters. S. 39 of the Contract Act is as follows:—"When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract unless he has signified by words or contract, his acquiescence in its continuance." Accepting the findings of the Subordinate Judge, the plaintiff no doubt broke his contract when he absented himself from work on the 31st March its 1909. The defendants were entitled to rescind the contract between them and plaintiff such contract consisting of the plaintiff's promise to work for one year and the defendant's promise to pay Rs. 216 for one year's service. What result follows after the contract was rescinded? S. 64 of the Contract Act says: "The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to the contract, restore such benefit, so far as may be to the person from whom it was received." S. 65 and its illustration (c) are as follows:—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it. A a singer contracts with B, the manager of a theatre to sing at his theatre, for two nights in every week during the next two months and B engages to pay her a hundred rupees for each night's performance. On the 6th night, A willfully absents himself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung." This illustration (c) in my opinion is almost conclusive in plaintiff's favor in this case. In the present case the plaintiff agreed to serve for one year just as A a singer in the illustration agreed to sing during the nights of two months. Here the defendants agreed to pay Rs. 18 a month as salary just as B in the illustration agreed to pay Rs. 100/ for a each night's performance. The only difference in the two cases is that it is not expressly said in the illustration that the remuneration to the singer A for all the night's performances should be paid at the end of the two months. But the conclusion that B must pay A for the five inghts on which she had sung implies that the remuneration was not to be paid at the end of each performance, for if that was the understanding B must have broken it by not having paid for the first night at the end of each night and she could not be said to have wilfully absented herself on the 6th night. That the strict rule of English Law would work

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injustice and would be inequitable if applied to all cases has been felt in many of the American States and has also been felt by some of the judges in England itself. In cases of death or illness of the servant and consequent rescission of the contract, American Courts always allow a *quantum meruit* on the ground that a contract may be implied between the master and servant that on such contingencies happening proportionate wages should be paid. In the American Cyclopedia (Vol. XXVI p. 1045) it is said that the more equitable rule which prevails in many states is that the employee is entitled to recover *pro rata* for the reasonable value of his services not to exceed the contract price, up to the time of the discharge, taking into consideration the damages resulting to the employer and in note 48 numerous cases decided in 10 different states are quoted to support this proposition. In the said Cyclopedia (Vol. XL Page 2833) it is stated "There are, however, a number of cases in which it is held that where an entire contract for services has been only partially performed, the party in fault may nevertheless recover from the other party for the actual benefit resulting to him from such partial performance." Then under note 43 several cases are quoted decided in several states. Of course if the services rendered have been of no benefit whatever for the employer, the master or principal cannot be made to pay anything to the servant or contractor. For instance in the case of building contracts if the incomplete building built by a contractor and the materials used by him are of absolutely no use and the building has to be wholly pulled down, the principal cannot be asked to pay the costs incurred by the contractor in the construction of the useless building. In Missouri it has been held that one who contracts to do work on a building but fails to complete his contract after partially performing it, is entitled to the reasonable value of the work done, not exceeding the contract price less whatever damage the other contracting party has suffered through the new completion of the contract. In Kansas it has been held that a recovery may be had in all cases where the other party has received benefit from the partial performance of the contract whether he has so received the sum and retained it from choice or *from the necessities of the case.* This last clause and the illustration (c) to section 65 meet fully, in my opinion, the contention put forward in the able arguments of Mr. R. Kuppuswami Iyer who appeared for the respondents in this case viz., that as the defendants could not exercise any choice now in respect of the benefit which they had obtained from the plaintiff's services during the 354 days during which he has served them they are under no obligation to remunerate him for the 354 days' service. As regards the reason-

able renumeration for the broken period, the broken contract is admissible to prove the value of the services for the broken period. See American Cyclopedia vol. XL. page 2849. As I said in the beginning the presumption that the work agreed to be done is indivisible and the wages to be given for such work is also indivisible is not in most cases in conformity with equity. Numerous exceptions have been grafted upon the rule and I think that where as in the present case the salary is calculated at so much per month in the agreement between the parties though it is payable at the end of the year, equity requires that the contract should be deemed divisible at least so far as to allow of division into entire monthly periods. As I have also said already Indian courts are not absolutely bound by English Precedents. In 34 Century Digest pages 544 to 555 the cases *pro* and *con* on this question are digested and several cases are quoted where the following two propositions have been laid down (a) "A servant who, without excuse, abandons his employment before the expiration of the term may, after its expiration, recover the value of the services performed, less the master's damages for the breach of the contract" and (b) where a party hires himself to another for a given period of time, and leaves the service before the expiration of the term without any fault on the part of the employer, the former may recover the value of the services performed as upon a *quantum meruit*, without showing that he performed his entire contract, or that he left the service of his employer for good cause." No doubt the cases which establish these two provisions are decidedly less numerous than the cases which establish the contrary proposition. But I might be permitted to repeat again that the Contract Act and the principles enacted by its provisions are more binding on the Indian courts than the majority of English and American Precedents. Reading sections 39, 64, 65 73 and 74 of the Contract Act together I am clearly of opinion that the 2 rules enunciated in the minority of the American cases already referred to are much more in conformity with the Contract Act than the majority of such cases decided in England and America. Mr. Shephard in his commentary to section 65 on the Contract Act admits that "that section is a departure from the English Law." He says "A right to compensation under the section exists although, according to English Law, apportionment would be said to be impossible. Thus when the plaintiff paid a lump sum by way of rent for a godown let to him for 12 months and during that period the godown was destroyed by fire it was held that as the lease had become void the plaintiff was entitled to

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recover a proportionate part of the sum paid. *Dhuramsey* v. *Ahmedbhai*[1]. In Tenesse the law has gone so as far to say that even where the employee has been guilty of a gross violation of duty and has even been discharged for embezzlement he can' still recover compensation for the services actually rendered by him. See *Massey Taylor Wood and Co.*[2] It is said by Lord Coleridge in *George* v. *Davies*[3] that *Lawrence*, J. in one of his judgments, distinguish *Cutter* v. *Powell*[4] which related to a sailor's contract for wages from the ordinary contract relating to the hiring of an ordinary servant, used the following words "with regard to the common case of a hired servant to which this has been compared, such a servant though hired in a general way is considered to be hired *with reference to the general understanding upon the subject that the servant shall* be entitled to his wages for the time he serves, though he did not continue in the service during the whole year." Thus there has at least been one English Judge who has taken the view which in my opinion is both the common law in India and the statute law enacted by the Contract Act. (This case in 2 King's Bench Division contains some other instructive remarks on this question). I believe that I have dwelt at sufficient length on the question of law involved in this case and differing from the learned Subordinate Judge I hold that the plaintiff is entitled to recover wages for the 11 entire months during which he did service there being no allegation in the written statements that by reason of his not working during the last 10 days of the stipulated period of one year the defendants have sustained any damages which they are entitled to set off. Defendants Nos. 2 and 3 as the 1st defendant's partners who authorised the 1st defendant to employ the plaintiff as a servant of the partnership are also liable for the plaintiff's claim. In the result judgment is given for the plaintiff for Rs. 198 and proportionate costs of suit with interest at 6 per cent. per annum on Rs. 198 from date of suit till date of payment against the defendants. The defendants will also pay the plaintiff's proportionate costs of this revision petition.

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1. (1898) I. L. R. 23 B. 15.
2. 98 Ame. Dec. p. 429.
3. (1911) 2 K. B. 445 at p. 449.
4. (1795) 2. S. L. C. Vol 1 p. 1.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

In Appeal No. 10 of 1908.

His Highness Mathu Sri Jeeyamba Bai Saheb ... *Plaintiff* (Appellant.)

v.

The Secretary of State for India in Council ... *Defendant* (Respondent.)

In Appeal No. 118 of 1908.

Panchanathaswaran ... *Plaintiff.* (*Appellant*)

v.

The Secretary of state for India. *Defendant.* (*Respondent.*)

Pensions Act Ss. 3, 4—Applicability of—Effect of—"Grant of land revenue" —Land Revenue—Nature of relinquishment of right to land revenue—Grant—Construction—Grant of land and of land revenue—Pensions Act S. 4.

Jeeyamba Bai *v.* Secretary of State for India.

A Grant after describing the lands granted proceeded thus "Total of 60 velies of land including wet and dry lands, water, trees, stones, nidhi, nikshapa, Treasure, Sidha, Sadhya, (whatever is and may be brought into existence) present and future patti, all *baut* and all *Kajna* with all samudayams, with water poured from the hand. Boundaries to be fixed and the land made dumala."

Held on the contruction of the grant, that the grant was distinctly of the "patta," "baub" and "Kana" and of Kudivaram right and, therefore, was a grant of land revenue within the meaning of S. 5 of the Pensions Act.

Where a grant was of land (the kudivaram right) and of land revenue distinctly, a suit for declaring the invalidity of the resumption of the land by the imposition of land revenue is barred by S. 4 of the Pensions Act.

The object of the definition of "land revenue" in S. 3 of the Pensions Act was merely to include payment to be made by the Government and not to confine the expression "grant of money" to such payments.

S. 4 does not require that the grant should be of land revenue alone in order to shut out the jurisdiction of the Civil Court to entertain a suit relating to a grant of land revenue.

Opinion of the Allahabad High Court that S. 4 would apply only where the land revenue is payable by the Government to the grantee in *Manu Lal* v. *Fazal Imam*[1] dissented from.

Land revenue is not a servitude attaching to the land. The kudivaram and melwarm are distinct interests constituting the totality of ownership in the land. The revenue is not a servitude on property which belongs to the kudivaram holder.

The relinquishment of the right to recover land revenue due on land is tantamount to the grant of land revenue.

But it may be that if land itself is granted without any distinct grant of revenue thereon the case would not come under S. 4.

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*Appeal Nos. 10 and 188 of 1908. 25th April 1912.

1. (1911) I. L. R. 33 A. 580.

Jeeyamba Bai v. Secretary of State for India.

Appeal from the decree of the Court of Subordinate Judge of Mayavaram at Kumbakonam O. S. No. 15 of 1907.

Appeal suit No. 818 of 1907 on the file of the District Court of Tanjore presented against the decree of the Subordinate Judge of Mayavaram at Kumbakonam in O. S. No. 19 of 1907 and transferred to this court of order dated the 10th September 1908 in C. M. P. No. 1269 of 1908.

In Appeal No. 10 of 1908.

K. Srinivasa Aiyangar and *S. Srinivasa Aiyar* for appellant

The Goverment Pleader for respondent.

In Appeal No. 188 of 1908.

T. R. Venkatrama Sastri for appellant.

The Government Pleader for respondent.

The Court delivered the following

Judgment:—This appeal was preferred against the decision of the Subordinate Judge of Mayavaram in a suit instituted by a Ranee of His Highness the late Rajah Sivaji of Tanjore against the Secretary of State for India in Council for a declaration that certain lands were absolute freehold inam and not liable to resumption by the Government and for recovery of the assessment paid by her under protest for Faslies 1312-1315. The lands in question along with some other lands, aggregating in all 26 velies, are situated in the village of Kottaiyoor in the Kumbakonam Taluk. The whole village was granted in inam by Maharajah Tuljaji of Tanjore in the year 1768 to 24 Brahmins by a grant under the Royal Seal (Sicca grant) which is marked as Exhibit L in the case. The lands in dispute in this suit were alienated by the descendants of the grantees at various times. Some portion of them came into the possession of the late Maharajah Sivaji in 1846 and others into the possession of the plaintiff's co-ranees and the plaintiff subsequently on various occasions, by purchases made for the benefit of a temple of which the plaintiff is the present trustee. The Government resumed the inam in June 1905, and collected assessment on the lands from the year Fasli 1312 the notification for resumption having been published in January 1903. The plaintiff's case is that Government had no right to resume the inam as the lands were granted as absolute freehold to the donees under Exhibit L. The plaint also alleged that no proper enquiry was held before the resumption and the order of resumption is therefore illegal. The defendant contended that the order of resumption was passed in conformity with the law

of the country and the orders of Government that the grant itself was invalid and that the title under the grant ceased on the alienation of the lands by the original inamdars. He also contended that the Civil Courts had no jurisdiction to question the legality of the order of resumption. The Subordinate Judge held that the right under the grant was forfeited both by the failure of the holders to bring the lands to settlement under the inam rules and by the alienations made by the inamdars. He also upheld the defendant's contention that the Civil Court had no jurisdiction to question the validity of the resumption. We are of opinion that the decision of the Lower Court on the question of jurisdiction is right and it is therefore unnecessary to go into the question whether the grantees under Exhibit L were entitled to alienate the inam and whether the order of resumption was legal.

The question whether the jurisdiction of the Civil Court is barred rests on the construction of Sec. 4 of the Pensions Act (XXIII of 1871) which enacts " Except as hereinafter provided no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for such pension or grant and whatever may have been the nature of the payment claimed or right for which such pension or grant may have been substituted." Section 6 provides that on a certificate from a Collector, Deputy Commissioner or other Officer authorised in that behalf a Civil Court can take cognisance of such claim. The question for decision is whether the suit is one relating to a grant of land revenue made by the Maharatta Government of Tanjore in 1768. Exhibit L is in the form of a letter addressed to "M. Anam Karkoons (Clerks) present and future, Subba Mannargudi ". After describing the lands granted the terms of the grant are thus set out. " Total of 60 velies of land including wet and dry lands, water, trees, stones, Nidhi, Nikshepa (Treasure), Sidha, Sadhya (whatever is and may be brought into existence) present and furure patti, all banb and all Kana with all samudayams with water poured from the hand. Boundaries to be fixed and the land made dumala. The gift is to be continued *puthra pouthra paramparaya* (*i. e.*, from son to grandson in succession.) Fresh orders from year to year are not required". It is contended for the appellants that the grant is of the land itself with evrything contained in it and not of the Government assessment or Melwaram. For the Government it is contended that the language of the document does not necessarily show that the gift was of anything more than the Melwaram or Government

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assessment and that at any rate the document expressly makes a grant of land revenue. There is no evidence on record to show whether the kudivaram right in the lands was vested in the Tanjore Government at the time of the grant or not. But the language is appropriate to a grant of kuudiwaram right also. We shall assume for the purposes of this judgment that the kudivaram right in the lands was vested in the Tanjore Government and passed to the grantees under Exhibit L. But taking this to be so, is Exhibit L, a grant also of the Melwaram or Government assessment or not? We are prepared to assume without deciding that a grant of all rights in certain lands vested in the Government without reserving any right to Government revenue would not by itself amount a grant of the land revenue on the ground that the land, not being liable to revenue in the hands of Government, a mere grant of the land should not be construed to mean a grant of what did not exist at the time, namely, the Government assessment on it. But it cannot be disputed that Government may grant the kudivaram to one person and the melwarm to another; similarly although both the kudivaram and melwaram may be combined in the hands of the Government, there is nothing to prevent it from treating them as distinct interests and granting to the same person. Now what is the fair construction of the words in Exhihit L. It is not disputed that the word "Patti" means Government assessment and that the words "baub" and "kanu" also mean certain cesses leviable by Government. According to the terms of Exhibit L, the 'patti,' 'banb' and 'kanu' are given to the grantees. The gift is not of the land only as sarvamanyam, though such a gift may have the effect of exempting the grantee from the payment of any revenue. The items of Government revenue are expressly stated to be granted as well as the land itself. There was nothing to prevent the Tanjore Rajah from granting the kudivaram and melwaram rights to the same grantee severally though he might also merely grant the land itself with all rights as sarvamanyam. It is argued that the Government revenue and cesses are referred to merely to show that the gift was to be free of liability to revenue and to express more fully the idea that the land was granted absolutely with all rights. But although the same legal effect might be achieved in either of two ways, the question is what was the method adopted in the particular case? The water, trees and stones might refer to rights included in the kudivaram. It is unnecessary to consider whether mines and treasures would form part of the kudivaram or melwaram right or of both. There is anyhow a distinct enumeration of Government assessment and cesses as subjects of the grant. We must

therefore hold that there was a grant of land revenue in Exhibit L. This being the case we are of opinion that the suit relates to a grant of land revenue.

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Section 4 of Act XXIII of 1871 does not require that the grant should be of land revenue alone in order to shut out jurisdiction of the Civil Court to entertain a suit relating to a grant of land revenue. Such a construction would be opposed to the plain language of the section. No authority has been cited which goes to the extent of holding that, where land revenue is separately granted (along with the land itself) from the kudivaram right therein, a Civil Court would have jurisdiction to determine a suit which relates to the land revenue alone. In the present case the Government, by its order of resumption merely resumed the land revenue; and levied full assessment on the land and the suit is for a declaration that the resumption by the Government of the land revenue was illegal. In *Rama* v. *Subba*[1] it was held that a suit for moiety of two villages granted as Jagir was unsustainable in the Civil Court without a certificate from the Collector against the rival claimant who set up an exclusive right to the whole Jagir. It does not appear that anything more than the melwaram was granted by the Government as Jagir and *prima facie* the grant would not include kudivaram right. The suit therefore apparently related only to the melwaram right and was clearly barred by Sec. 4 of Act XXIII of 1871. The decision, however, proceeded on a wider ground. The learned Judges *Collins*, C. J. and *Muthusaym Iyer*, J. were apparently of opinion that, even though the inam might consist only of the land revenue, if it was granted to one in whom the kudivaram right was also vested and if a dispute arose between rival claimants of both the kudivaram and melwaram right, a suit relating to such dispute would not be maintainable in the Civil Court even with respect to kudivaram right. The view adopted by them was that unless the inam had been enfranchised and made the freehold property of the Inamdar the jurisdiction of the Civil Court was shut out formerly by the provisions of Regulation IV of 1831 and afterwards by Act XXIII of 1871. Regulation IV of 1831 in terms excluded the jurisdiction of the Civil Courts only with respect to grants of land revenue. Act IV of 1862 rescinded the provisions of Regulation IV of 1831 in cases in which the inam was enfranchised. It is unnecessary to consider whether, when there is a grant of the land revenue only to persons already owning the kudivaram right, there is anything in Sec. 4 of Act XXIII of 1871 construed in the light of Regulation

1. (1888) I. L. R. 12 M. 98.

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IV of 1831 and Act IV of 1862 to take away the jurisdiction of the Civil Court with respect to a claim to the kudivaram right. Reference is made by the learned Judges to the judgment of *Holloway* and *Kindersley* JJ. in *Periyakovil Kalaviappan* v. *A. Pulliah Chetty*.[1] The suit in that case was for the recovery of certain lands which the plaintiff alleged he has purchased from an inamdar. It does not appear whether the inam in that case consisted of the melwaram right only or of the land itself. The judgment apparently proceeded on the footing that it was the melwaram but that the kudivaram already belonged to the grantee at the time of the grant. It was argued that the release by the Government in favour of the owner of the kudivaram, of the right to the revenue could not be taken to amount to a grant of the land revenue. This contention was negatived. The learned Judges say "it appears therefore to us that the receipt from a tenant of a revenue less than that assessable upon land of the same quality is a gift or grant of the difference." The dismissal of the suit by the District Court was upheld in second appeal. The judgment also apparently assumed that a suit relating to the kudivaram would also be unsustainable if it vested in the same person as the inam grant of melwaram. On the other hand *Panchanadhayyan* v. *Nilakandayyan*,[2] where the suit was for partition of certain lands and it was found that the inam grant was of the lands themselves revenue free and not merely of the revenue, it was held that the suit was maintainable. *Turner*, C.J. says: "We are of opinion that the nature of the grants is such that they do not come within the provisions of the Pensions Act. The Act contemplates money payments to be received through the Collector or recovered from persons bound to pay revenue. It does not appear that the grant contained a distinct gift to the grantee of the Government revenue of the land as Exhibit L does in this case. The case is only authority for the position that where there is no gift of the land revenue as such, the case does not come within the purview of Sec. 4 of the Pensions Act. In *Kumara Tirumalai Naik* v. *Bangaru Turumalai Naick*[3] the suit was *inter alia* to remove the defendants from the management of certain inam lands and to appoint other managers. The grant was not made by the sovereign power, but was confirmed by the British Government. The Court held in accordance with the view taken in *Panchanadhayyan* v. *Nilakantayyan*[2] that assuming that the confirmation by the Government of the previous grant amounted to a re-grant, it could not be said that the giving of the land free of revenue was a grant

1. 1 Ind. Jur. 164.
2. (1882) I. L. R. 7 M. 191.
3. (1898) I. L. R. 21 M. 310.

of land revenue so as to bring the case within the provisions of the Pensions Act." Freedom from liability to land revenue is not identical with holding a grant of land revenue, any more than the extinction of an easement by becoming sole proprietor of the property, servient as well as dominant is a grant of an easement. The land revenue arising from a man's own holding, when it is remitted and the land pays nothing, is rather extinguished than granted. See *Babajee* v. *Rajaram*.[1] It may be that if the land itself is granted without any distinct grant of the revenue thereon, the case would not come within Sec. 4. But the observation that the relinquishment of the revenue due on land previously subject to it is not tantamount to the grant of the revenue is more questionable and is opposed to the decision of this Court in *Periyakovil Kalaviappan* v. *A. Pulliah Chetty*.[2] Land revenue is not a servitude attaching to the land. The kudivaram and melwaram are distinct interests constituting the totality of ownership in the land. The revenue is not a servitude on property which belongs to the kudivaram holder. The case is, however, is not similar to the present one as there was apparently no distinct grant of land revenue in that case. Whether *Panchanadayyan* v. *Nelakantayyan*[3] and *Kumara Tirumala Naik* v. *Bangaru Tirumala Naik*[4] are reconcilable with *Rama* v. *Subba*[5] or not they do not, for the reason alreaday mentioned, affect the decision to become to in the present case. *Babaji Hari* v. *Rajaram Balal*[1] and *Ravaji Narayan Mandlik* v. *Dadaji Bapuji Desai*[6] were similar to *Panchanadhayyan* v. *Nilakantayyan*[3] and *Kumara Tirumala Naik* v. *Bangaru Tirumala Naick*[4] and decided merely that where the grants is of the land itself, S. 4 of the Pensions Act does not apply. Our attention was drawn to the fact that in the latter case in a letter accompanying the Sannad and written to the Desathikaries and Deshlekhakes the present and future patti (taxes) was said to be granted to the inamdar as in Exhibit L in this case. But the Sannad itself did not mention the pattis. See Page 524. And it was contended by the defendant in that case that there was a distinct grant of the revenue of the land. *Ganpat Rao* v. *Ananda Rao*[7] was also similar to *Panchanadhayyan* v. *Nila kantayyan*[3] so also was *Ganapat Rao* v. *Ananda Rao*.[8] In the latter case the Privy Council did not definitely decide the point although their Lordships' observation might show that, if the grant was of the land itself and not of the revenue, S. 4 of the Pensions

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1. (1875) I. L. R. 1 B. 75 at 81.
2. 1 Ind. Jur. 164.
3. (1882) I. L. R. 7 M. 191.
4. (1898) I. L. R. 21 M. 310.
5. (1888) I. L. R. 12 M. 98.
6. (1875) I. L. R. 1 B. 523.
7. (1905) I. L. R. 28 A. 104.
8. (1909) I.L.R. 32 A. 148. (P.C).

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Act would not be applicable. In *Mannu Lal* v. *Fazal Imam*[1] also apparently the grant was of the land itself. The learned Judges *Richard*, C.J. and *Banerjee*, J. were apparently of opinion that S. 4 would apply only where the land revenue is payable by the Government to the grantee. They refer to S. 3 which states that land revenue includes anything payable on the part of the Government in respect of any right, privilege, perquisite or office. The object of the definition was merely to include payment to be made by the Government and not to confine the expression "grant of money" to such payments. We are unable to accept this restricted interpretation of S. 4. The decision of the case, however, is rested on the authority of *Ganapat Rao* v. *Anandla Rao*[2] and proceeded therefore on the ground that the grant was of the land itself and not of the revenue thereon. In *Gunnaiyan* v. *Kamakshi Iyer.*[3] *Bashyam Iyengar*, J. observed (page 345) "that claims in respect of personal inams which have not been enfranchised are exempt from the cognisance of Civil Courts and may be adjudicated upon only by the Governor-in-Council or other executive authority". The respondent contends that the learned Judge adopted the view taken in the case in *Rama* v. *Subba.*[4] Whether it was the intention of the legislature to shut out from the jurisdiction of the Civil Courts all claims relating to the kudivaram right also where both the kudivaram and melwaram are granted by the Government to the same person and whether such intention has been effectively carried out in S. 4 of the Pensions Act, it is not necessary for us to decide in this case. As we read Exhibit L there was a distinct grant of the land revenue apart from a grant of the kudivaram right. The suit therefore relates to a grant of land revenue and it relates only to the land revenue. We are therefore of opinion that the suit is barred by S. 4 of the Pensions Act. We dismiss the appeal with costs.

Appeal No. 188 of 1908 follows and is dismissed with costs.

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1. (1911) I. L. R. 33 A. 580.
2. (1905) I. L. R. 28 A. 104.
3. (1902) I. L. R. 26 M. 339.
4. (1888) I. L. R. 12 M. 98.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

Randipurazil Kunhisow Karnavan and Manager of his tarwad. } *Appellant* (*Plaintiff.*)

v.

Alukandiyil Parkum Mulloli Chathu ... ... } *Respondent* (*Defendant.*)

Landlord and tenant—Lease, assignment and rent—Liability for—Apportionment—Privity of estate

An assignee of a lease from the lessee can claim as against the lessor an apportionment of rent accruing due after the date of his assignment according to the period before and after the assignment and the rent can be deemed as accruing from day to day as between him and the lessor.

Privity of estate is the ground of the assignee's liability and there is no reason why it should be made heavier than the extent of his privity would justify.

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Second appeal from the decree of the District Court of North Malabar in A. S. No. 510 of 1910 preferred against the decree of the Court of the District Munsif of Kuthuparamba in O. S. 474 of 1910.

C. V. Anantakrishna Aiyar for appellant.

K. Govinda Marar for respondent

C. V. Anantakrishna Aiyar. The assignee is liable to rent accruing due subsequent to assignment. He referred to *Lakshminaranappa* v. *Meloth Raman Nair*[1], *Kunhanujan* v. *Anjelu*[2] (court purchase) *Monica Kithari saldauha* v. *Subbaraya Hebbura*[3], (court purchase). Foa pp. 124—126—Redman at p. 653 says that the assignee is liable to rent accruing subsequent to assignment—Fawcett p. 401 and 409, says transferee is liable for subsequent rent Bacon's Abridgment, Title, Rent (m) clause (2) Woodfall p. 294. 18 Halsbury 483 and 592 *Titterton* v. *Cooper*[4], Lastly *Rangasami Iyengar* v. *Shanmugam Pillai* [5] is not against me.

K. Govinda Marar. There is no privity of contract as the period of contract was over. The lessee's right was sold in this case in court auction. Mere occupancy creates no privity. *See Chaturbhuj* v. *Bennett*[6].

The Court delivered the following

Judgment :—This is a suit for rent for three years 1083 to 1085 Malayalam year. Defendants 1 to 3 are sought to be made liable

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*S. A. 1581 of 1911. 13th November 1912.

1. (1902) I. L. R. 26 M. 540.
2. (1889) I. L. R. 17 M. 296.
3. (1907) I. L. R. 30 M. 410.
4. (1882) 9 Q. B. D. 473, 490.
5. (1910) I. L. R. 20 M. L. J. 739.
6. (1904) I. L. R. 29 B. 323 344.

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directly under the mampa or rental instrument, the 1st Defendant and the manager of the family of defendants 2 and 3 being the executants of the Marupat. The 4th Defendant purchased the rights of defendants 1 to 3in the land on the 4th January1909 during the currency of the year 1084 and assigned his rights to defendants 6 & 7 on the 29th April 09; about 3½ months after his purchase. The plaintiff's case is that the 4th Defendant is also liable for the rent of the Malayalam year 1084 andthatDefendants 6and7areliable forthe rents of the years 1084 and 1085. The District Munsiff passed a decree against the 4th Defendant for the rent of the year 1084. He appealed to the District Court on the ground that he was liable only for the rent accruing from the date of his purchase up to the date of his assignment to defendants 6 and 7 i.e., from the 4th January to 28th April 1909. The District Judge upheld his contention.

The plaintiff has preferred this second appeal and his contention is that the 4th defendent is liable for the whole of the rent for the year 1084 in as much as the rent for that year became payable after his purchase. Exhibit A. The rental instrument, did not fix any specific date for the payment ofthe annual rent. A rent of Rs. 60 per annum was fixed to be paid from the 25th Meenam, 1069. It is argued that this must be construed to mean that the rent should be paid on the 25th Meenam each year. In the plaint the allegation is that the annual rent is was payable in monthly instalments. We cannot say, onthe construction of A that the25th of Meenam can be regarded as the date fixed for the payment of rent every year. The Malayalam year 1084 expired only after the 4th defendant's assignment of his rights under the lease. If the rent is regarded as payable at the end of each Malayalam year, the plaintiff can have no ground for holding the 4th defendant liable for the whole rent of 1084. If the tenancy be regarded as running from the 25th Meenam each year to the 24th Meenam of the succeeding year, then the rent due for 1084 fell due during the period that the 4th defendent held the leasehold interest by virtue of his purchase. Assuming that the whole rent for the year was intended to be payable on the 24th or 25th Meenam, can it be held that the 4th defendent is bound to pay the whole of the rent for 1084? S. 108 of the Transfer of Property Act lays down that "a lessee may transfer his interest in the leasehold property" but that he "shall not, by reason only of such transfer, cease to be subject to any ofthe liabilities attaching to the lease." It does not enact any rule regarding the liabiliaty of the assignee but as the assignee becomes the lessee from the date of the assignment, according to the section, he must be held liable for the rent

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accruing after the assignment. The appellant's argument is that a covenant to pay rent being one running with the land, the assignee is bound to discharge all obligations under the covenant which mature after the assignment. It is no doubt the rule that an assignee is liable for all breaches of express covenant running with the land accruing after the date of assignment. There is a privity of estate between the lessor and the assignee and the latter is bound to perform the covenant of the lease after the assignment. If a covenant to keep the premises in repair or to do an act on a day which falls after the assignment is broken subsequently, the assignee is undoubtedly liable. That a covenant to pay rent is one running with the land appears to be the established rule in England. See Woodfall's Landlord and Tenant p. 189. The assignee is liable for rent even though he may not have taken possession. See p. 296 of the same book. For possession is not the ground of his liabity, but the privity of estate which is created by the assignment itself." 24 American Cyclopædia of Law and Procedure, page 1180." But the question for our decision is whether the liabity on the covenant can be apportioned or not. According to S. 36 of the Transfer of Property Act, all rents are, upon the transfer of the lease, to be deemed, as between the transferor and transferee, to accrue due from day to day to be apportionable accordingly but to be payable on the days appointed for the payment therefor. See *Lakshmi Narayanappa* v. *Mallothraman Nair*[1]. No rule of apportionment has been laid down in the Act, with regard to liability for rent, as between the lessor and the transferee from a lessee. It is settled law that the privity of estate between the lessor and the lessee's assignee is terminated by the assignment to a third person by the assignee, and the latter would not be responsible to the lessor for rent after he has assigned his rights under the assignment to himself. The question whether the assignee of a lease can claim as against the lessor an apportionment of the rent accruing after the date of his assignment does not appear to have been definitely decided either in this country or in England in cases arising between the lessor and the assignee. But on principle there seems to be no reason why he should not be entitled to do so, and why the rent should not be deemed accruing due from day to day as between him and the lessor. The liability of the assignor of a lease continues notwithstanding the assignment and the lessor cannot be damnified in any manner by the apportionment of liability on the personal covenant for rent so as to make the assignee liable only for the rent accruing after the assignment. Privity of estate being the ground

1. (1902) I. L. R. 26 M. 540.

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of assignee's liability, there is no reason why it should be made heavier than the extent of that privity would justify. If the lease contains any provision entitling the lessor to any right in case of a breach of the covenant to pay rent on a day subsequent to the assignment, he should no doubt be entitled to exercise that right as against the assignee. But it does not follow from this that he should be liable to have a decree passed against him personally for the payment of more than the rent accruing after the assignment in his favour. If the assignment be of a portion only of the premises included in a lease it is settled law that the assignee is not liable for more than the proportionate rent due on what is comprised in his assignment. Why should not the same principle apply where diminished liability is claimed not on the ground that the whole of the premises has not been assigned, but on the ground that the assignment has been in operation only during a portion of the period for which rent is claimed. In Halsbury's Laws of England Vol.18 p 483, it is stated that "an apportionment can be made not only as between the persons entitled to the rent but also as against a tenant whose liability for rent ceases or changes its character between two rent days, and after the day when the entire portion of rent has or would have fallen due and that proportionate rent is recoverable against the tenant as rent due under the lease. Consequently, a lessee who surrenders his lease between two rent days is liable for rent up to the surrender and a lessee on whom a lessor lawfully re-enters is liable for rent up to the re-entry." In *Swansea Bank* v. *Thomas*[1] a liquidator in whom the residue of a term under a lease became vested assigned over during a current quarter. In an action brought after the expiration of the quarter against the transferee by the lessor to recover a proportionate part of the quarter's rent up to the time of the assignment over by him, it was held that the lessor was entitled to apportionment. In England the law of apportionment has long been regulated by Statutes and the case was decided on the construction of 33 and 34, Vict. chapter 35 which provided that " all rents annuities, dividends and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall, like interest on money lent be considered as accruing from day to day and shall be apportionable in respect of time accordingly. According to the common law of England rent neither accrued due nor was payable except on the day on which it was reserved although interest on money lent accrued due *de die in diem* although it might be payable on certain specified days. In India there is no reason for not applying to rent the principle

1. (1879) 4 Ex. D. 94.

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adopted in England in the case of interest. There are other cases in England which follow the rule laid down in *Swansea Bank* v *Thomas*[1]. See *Re Johnson exparte Blackett* [2] and *Re Wilson exparte Hastings*[3]; in *Re South Kensington Co-operative Stores*[4]; in *Re Howell exparte Maudleburg and Co.*[5] If the lessor can claim apportionment as against the lessee assigning his right, there is no reason why the assignee should not have the right to make a similar claim against the lessor. Reason and equity seem to us to require that he should have such right. In *Glass* v. *Paterson* [6] it was held that an assignee was only liable for the apportioned rent from the date of assignment In America a different view appears to have been taken. McAdum in his work on "Landlord and Tenant" Vol. I p 801, says "When a covenant to pay rent becomes broken after an acceptance of an assignment and during actual possession, the assignee is liable for the whole rent then becoming due." It is not clear how the question of actual possession is material, seeing that privity of estate and not possession is the ground of the assignee's liability. The Irish decision in *Glass* v. *Paterson*[6] seems to be more in accordance with the ratio of the English cases referred to above and with principle and justice.

We must therefore hold that the plaintiff's claim against the 4th defendant for the whole rent of the year 1084 should not be sustained and this second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Napier.

Sri Datla Venkata Suryanarayana Jagapati Raju Bahadur Garu and another ... ... *Plaintiffs* (Appellants.)*

v.

Sri Raja Inuganti Venkataraja Gopala Surya Rao Bahadur Garu and others ... ... *Defendants* (Respondents.)

Suryanarayana Jagapati Raju v. Gopala Surya Rao.

Civil Procedure Code (XIV of 1882) S. 295—"Money Decree"—Mortgage Decree expressly exempting personal liability—Collusion and corrupt bargain between judgment-debtor and decree-holder in getting a personal decree—Proof

A mortgage decree for sale containing an express provision exempting the defendants from personal liability is in no sense a "decree for money" within the meaning of S. 295 Civil Procedure Code (XIV of 1882.)

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*A. No. 41 of 1909. 16th October 1912.

1. (1879) 4 Ex. D. 94.
2. (1894) 70 L. T. 381.
3. (1893) 62 L. J. Q. B. 628 and 632.
4. (1881) 17 Ch. D. 161.
5. (1895) 1 Q. B. 844.
6. (1902) 2. Irish, Report 660.

Surya-narayana Jagapati Raju v. Gopala Surya Rao.

It is open to one decree-holder to prove collusion or a corrupt bargain between the judgment-debtor and another decree-holder in the former consenting to a personal decree being passed against him in favour of the latter so as to entitle the latter to rateable distribution; and a court if satisfied of the collusion or corrupt bargain will not allow rateable distribution.

Appeal from the decree of the Court of the Subordinate Judge of Godaveri in O. S. No. 63 of 1907.

S. Srinivasa Aiyangar for appellants.

P. Narayana Murthi for respondents.

S. Srinivasa Aiyangar :—The question is whether an ordinary mortgage decree is a decree for money within the meaning of S. 295 of Civil Procedure Code. The Full Bench case in *Vaidhinada-samiar* v. *Somasundaram Pillai*,[1] and other cases quoted therein are all cases where there is either a personal decree for money or such a decree can be passed. It is only such decrees that can be said to be money decrees. In *Krishnan* v. *Venkatapathy Chetti*[2] the High Court has held that a decree which did not contain the personal liability was a decree for money. That case can be distinguished from the present case. In this case the decree specifically states that the 1st defendant is not to be personally liable. In the new Code there is a special provision, as to this. Order XXI, rules 18, 19 and 20. The observations of Amir Ali and Woodroffe at p. 533 is in my favour. Therefore the Lower Court's view that the present decree is not a money decree is correct.

As to the effect of the application under S. 90 of the T. P. Act for a personal decree, the petition was put in on the 13th August. and the hearing was adjourned to the 22nd. But on the 17th the day on which the sale proceeds were paid into court the judgment-debtor consented to the hearing of the petition being advanced to the 17th and by consent the decree was passed. It is in evidence that this was brought about by means of an arrangement between the judgment-debtor, and the decree-holder whereby the decree-holder signed to share the amount in rateable distribution with him. This is collusive act affecting my client prejudicially. I can show that the decree was a collusive one and cannot bind me. See *In re Sundara Das*[3], *The Delhi and London Bank* v. *The Uncovenanted Service Bank Bareilly*[4], *Chagan Lal* v. *Fazir Alli*[5] even though I am a stranger to the supplemental decree and can impeach it on account of collusion. *Chennirappa* v. *Puttappa.*[6] Moreover the court could not pass a personal decree against the 1st

1. (1909) I. L. R. 28 M. 473 (F. B.)
2. (1905) I. L. R. 29 M. 318.
3. (1889) I. L. R. 11 C. 42.
4. (1887) I. L. R. 10 A. 35.
5. (1888) I. L. R. 13 B. 154.
6. (1887) I. L. R. 11 B. 780.

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defendant in this case as the question of his personal liability has been determined in the original suit and has been negatived. The matter is *res judicata*. *Abhaki* v. *Krishnayya*.[1]

I also contend that the present application for personal supplemental decree is incumbent as the mortgagee has brought the mortgaged properties to sale. It is only when the mortgaged properties are brought to sale and any amount is still unrealised that an application under S. 90 can be made *Ram Rayan Chakravarti* v. *Indra Narain Das*[2], *Kammachi Kather* v. *Pakker*[3], *Munamar Husain* v. *Jani Bijai Shunker*,[4] *Ramachandra Marwari* v. *Rani Kishobati Knmari*[5]

P. Narayanamurti :—The present plaintiff could not attack collaterally a decree obtained by the 1st defendant against the 2nd defendant under S. 90 T. P. A. except on the ground of fraud, collusion or want of jurisdiction. There is no such thing here. There is no collusion where a person obtains what he is legally entitled to even though it may prejudice a third party. Stroud's Jud. Dictionary ' collusion.'

As regards the question that there was no sale under S. 90 T. P. A. and so no decree could be passed thereunder, my answer is no sale need actually take place when it is impossible to realize anything or where the mortgaged properties are found to belong to another. *Pubhu Narain Singh* v. *Baldeo Misra*[6], *Sheo Prasad* v. *Behari Lal*[7], *Shunmuga Pillai* v. *Ramanathan Chetty*.[8] The case in *Ram Ranjan Chakravarti* v. *Indra Narain Das*[2] is distinguishable. Lastly even though there is no personal decree under S. 90 or in the original mortgage decree every mortgage decree as such includes and contains a personal decree. I also rely on the change in the language of the present Code in Ss. 246, 258 and 295 where the language is (" decrees of any land.") Even in the draft forms found in the Appendix to the Civil Procedure Code of 1908 the mortgage decree says that the money shall be payable. The result of holding otherwise is to make an unsecured creditor have a preference over secured creditors. The case in *In re Sundar Dass*[9], *Chaganlal* v. *Fazar Ally*,[10] are cases where the decrees are sham decrees.

The Court delivered the following

1. (1909) I. L. R. 32 M. 534.
2. (1906) I. L. R. 33 C. 890.
3. (1896) I. L. R. 20 M. 107.
4. (1905) I, L. R. 27 All. 619.
5. (1904) 1. C, L. J. 189.
6. (1906) I. L. R, 29 A. 263.
7. (1902) I. L. R. 25 A. 79.
8. (1894) I. L. R. 17 M. 309 at 314.
9. (1889) I. L. R. 11 C. 42.
10. (1888) I. L. R. 13 B. 154.

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Judgment:—The question in appeal is whether the Respondents (Defendants Nos. 2 to 8) decree-holders in O.S. No. 69 of 1902 are entitled to rateable distribution along with the plaintiffs who obtained a decree against the same judgment-debtor the 1st Defendant in O.S. Nos.57 and 58 of 1904. The plaintiffs after having obtained the decree sold the properties of the 1st defendant in execution thereof on the 3rd August 1906. One-fourth of the sale proceeds was then paid into court and the balance was deposited in court on the 17th August 1906. The defendants 2 to 8 obtained their decree on the 9th March 1903 against the 1st defendant who was the 2nd defendant in that suit and also some other parties. Whether it is a money decree are not so far as the 1st defendant is concerned, is one of the questions in dispute. On the 13th August 1906 they made an application under S. 90 of the Transfer of Property Act for a personal decree and on the 17th of the same month they obtained a decree by consent, which undoubtedly is a personal decree against the 1st defendant. On the same date they made an application (Exhibit C) for rateable distribution. It will be observed that this was the same date on which the balance of the sale proceeds was paid into court by the purchaser of the properties in execution of the plaintiff's decree in O. S. Nos. 57 and 58 of 04. The plaintiffs dispute the right of the respondents to claim rateable distribution. The Subordinate Judge held that under the decree in O. S. No. 69 of 02 dated the 9th March 1903, the respondents were not entitled to any rateable distribution as it was not a money decree; but he was of opinion that the decree which was passed on the 17th August 06 was not collusive and therefore illegal as contended for by the appellants and that the respondents were therefore entitled to rateable distribution under that decree. With reference to another argument that was advanced on behalf of the appellants that, as the purchase money was realized on the 17th August and the respondents obtained their consent decree only on the same day, it cannot be said that they had made an application "before the realization of the sale proceeds" which is necessary to entitle them to rateable distribution under S. 295 of the Civil Procedure Code, the Subordinate Judge held that as a matter of fact the decree was passed and the application was made before the realization and that therefore the respondents were not disentitled to rateable distribution on that ground. In appeal the same contentions have been mainly pressed upon us on behalf of the appellants.

It was contended before us that the decree passed on the 9th March 1903 in O. S. No. 69 was not a personal decree. That suit was brought bythe respondents Nos. 2 to 8 against the 1st defendant,

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Surya Rao who was the 2nd defendant in that suit and also against one Venkatrama Rayanim Garu the 1st defendant therein and his minor sons who were defendants Nos.3 and 4 in that suit on a mortgage bond executed by the 1st defendant therein and the father of Surya Rao the present 1st defendant. The plaintiffs prayed for a decree directing the defendant Nos. 1 to 4 to pay the amount due to them into court; and in default for the sale of the mortgaged property subject to the claims of certain prior mortgagees; for payment by the 1st defendant therein of the balance due after such sale and for the recovery of such balance by the sale of the other family properties of defendants No. 1, 3 and 4 and the family properties of the 2nd defendant Surya Rao the present 1st defendant (See Ex. II). The decree directed the 1st defendant therein to pay to the plaintiffs the amount claimed above Rs. 90,000 with interest thereon within a certain date. Then after the usual directions for the sale of the property in default of payment etc., there followed this important direction "that the defendants 2 to 4 be exempted from personal liability to the decree and that their shares in the mortgaged property be answerable." (See EX.A). The question that was argued at great length in this case was whether this was a personal decree or not; and both sides relied upon the Full Bench case in *Vaidhyanathaswami Aiyar* v. *Somasundara Pillai*[1]. In that case it was held that "every decree by virtue of which money is payable is to that extent a decree for money." See p. 477. The decree in the case before the Full Bench contained an order for the sale of the mortgaged property and also an order for the recovery personally from the judgment-debtor what might remain undischarged after the sale of the mortgaged property. There were similiar directions in the other cases decided by this court referred therein *viz., Kammachikather* v. *Pakker*[2] and *Abdulla Sait* v. *Doctor Oosman Sait*[3]. This is the usual form of decree passed in mortgage suits in this Presidency and as all these decrees contain a direction for the payment of the money, though the mortgaged properties are first to be sold and it is only for the undischarged balance that the judgment-debtor is to be personally liable such decrees are decrees for money according to this Full Bench Division. In a later case, however, *Krishnan* v. *Venkatapathy Chetti*[4] there was only a decree for the recovery of the money by the sale of the mortgaged property. There was no order for payment of money nor was there any order that the balance may be recovered personally or from the other properties of the debtor; and yet it was

1. (1909) I. L. R. 28 M. 473.
2. (1896) I. L. R. 20 M. 107.
3. (1904) I. L. R. 28 M. 224.
4. (1905) I. L. R. 29 M. 318.

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held on the strength of the Full Bench decision that it was a money decree. It may be reasonably doubted whether the Full Bench decision goes the length.

The decree in the case in *Krishnan* v. *Venkachalapathi* [1] may be a decree for money according to the Full Bench decision to the extent it may be discharged by the sale proceeds of the property sold. As for the balance that might be due, if there is no decree at all directing the defendant to pay the money, there can scarcely be said to be a money decree. However in the decree in O. S. No.69 passed on the 6th March 1903 there is no direction that the 2nd defendant Surya Row should pay any money at all. On the other hand his share in the mortgaged property is alone declared to be answerable. This might make it a personal decree according to the decision in *Krishnan* v. *Venkatachelapathi*[1] to the extent of the sale proceeds that may be realized by the mortgaged property, but in this case it is admitted by the respondents in their petition (D) for a decree under S. 90 T. P. Act that the mortgaged property is worthless, that it is encumbered to much more than its market value and that when they attempted to get the property sold in court auction there was no bid at all; Mr. Srinivasa Aiyangar also relies upon the provision in the decree that the 2nd defendent is exempted from personal liability to show that it cannot be construed as a personal decree. The contention appears to be right. There can scarcely be said to be a money decree in the face of such a provision. We confirm the finding of the subordinate Judge on this point.

The next question is whether the defendents—respondents Nos. 2 to 8 are not entitled to rateable distribution under the decree as modified on the 17th August 06. Various objections are taken to this decree. It is however necessary to consider only one of them: As already pointed out, the decree originally passed on the 9th March exempted the defendants Nos. 2 to 4 from any personal liability. This amounts to a decision that they were not liable. Their properties therefore, could not have been attached and sold in execution of that decree. The matter is *res judicata*: See *Abhakhi* v. *Krishnayya.*[2]

The respondents however made an application on the 13th August 06 for a decree to be passed under S. 90 of the Transfer of Property Act. They further alleged that sums due to certain prior mortgages amounted to seven lakhs of Rupees which was more than the value of the mortgaged property and prayed for a decree directing the decree amount to be recovered from the 1st defendant personally and from the family properties of defendants Nos. 2 to 4. On this application the following decree was passed by consent.

1. (1905) I. L. R. 29 M. 318. 2. (1909) I. L. R. 23 M. 534.

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"This Court doth order and decree that the plaintiffs do recover from the 1st defendant personally and from the family of defendants 1 and 2 Rs. 85709-12-6 etc." It appears that the respondent's application for a decree under S. 90 presented on the 13th August was first posted to the 22nd August for hearing (See Ex. E.) and that petitions were presented by both parties on the 17th consenting to a decree being passed as prayed for (See Exhibits E and F). It is admitted by the defendant one of the decree-holders in O. S. No. 49 as plaintiff's first witness that an agreement was entered into between himself and Surya Rao, the judgment-debtor in that suit that he should consent to such a decree being passed against him and if the decree-holder were on account of such decrees awarded any amount for his share in the rateable distribution of assets, he should divide it with the judgment-debtor; the decree-holder was to take two-thirds, and Surya Rao, one third and it was on this understanding that the judgment-debtor against the decree being "converted" into a money decree (See the deposition of the 2nd deft). There was therefore undoubtedly a corrupt bargain between the parties. The judgment-debtor consents to a decree being passed against him for a consideration to be received by him consisting of a share of the money which the decree-holder would in that event receive out of the sale proceeds to the detriment of the present plaintiffs. If the judgment-debtor had not consented to that, the decree-holder, the 2nd defendant, would not have realized anything and the plaintiffs (appellants) would have realized the entire sale proceeds. Thus according to the terms of the decree which was passed on the 9th March the plaintiffs therein were not afterwards entitled to get a decree for money against the judgment-debtor in that suit; the decree for money subsequently passed was no doubt one obtained in collusion; the plaintiffs (appelants) were clearly entitled to prove that it was so obtained as they are prejudiced thereby.

We hold accordingly that the respondents was not entitled to claim any rateable distribution under this decree and they are directed to pay to the plaintiffs the amount received by them Rs. 7984-14-9 with future interest at 6 P. C.

The appellants are entitled to their costs throughout.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

P. K. Govindan Nair and others ... *Appellants (Petitioners).

v.

P. Narayanan Nair and others ... *Respondents.*

Lunacy Act XXXV of 1858—Malabar tarwad—Jurisdiction to appoint guardian for a lunatic Karnavan—Malabar tarwad and Hindu joint family—Karnavan's right of ownership and possession and Malabar Law—Distinction between Tarwad and Hindu joint family as regards co-parcener's rights.

Govindan Nair *v.* Narayanan Nair.

No application will lie under the provisions of Act XXXV of 1858 to adjudicate a member of an undivided Malabar tarwad a lunatic even though the member be the Karnavan of the tarwad. The tarwad property is not the individual property of the karnavan and a manager appointed for a lunatic Karnavan will obtain no rights over the tarwad property.

Rights of a Karnavan of a tarwad over tarwad property defined, both as regards ownership and possession.

Distinction between a Mitakshara joint family in Hindu law and a Marumakkathayam tarwad as regards the rights of their component members pointed out.

If a Karnavan becomes a lunatic, the next senior member of the tarwad has the right to succeed to the management.

Per *Sadasiva Aiyar* J :—Blindness by itself is no disqualification for a karnavanship.

Appeal from the order of the Court of the District Judge of South Malabar in C. M. P. No. 2 of 1912.

T. R. Ramachandra Aiyar for appellants.

The Advocate-General (*J. L. Rosario*) for respondents.

The Court delivered the following

Judgments :—*Sundara Aiyar* J. :—The application which gave rise to this appeal was one under Act XXXV of 1858 to adjudicate the Karnavan of a Malabar tarwad a lunatic and to appoint a Manager for his estate. The application was dismissed by the District Judge of South Malabar, he being of opinion that no application would lie under the provisions of Act XXXV of 1858 to adjudicate a member of an undivided Malabar tarwad a lunatic. He did not, on the view he took, consider it necessary to hold an enquiry as to the question whether the Karnavan was in fact a lunatic or not.

The question for our decision is whether that view is right. No decision bearing on the precise question has been brought to our

* C. M. A. 88 of 1912. 17th October 1912.

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notice. The competence of the court to adjudicate an undivided member of a Mitakshara family a lunatic has been considered in some cases. In *Trimbaklal Govindas* v. *Hiralal* [1] it was not necessary for the court actually to decide the question, an adjudicaton having as a matter of fact been previously made in that case and a manager having been appointed. The question before the court was whether the manager so appointed who was another member of the undivided family was bound to render accounts in accordance with the provisions of S. 17 of the Act. Farran C. J. and Parsons J. held that the court would not make him render an account under the section. At p. 666 Farran C. J. observed "The Act provides no machinery nor does it confer any power upon the court to deal with joint family property or interfere in the affairs of a joint family". This observation tends to show that if the question had actually arisen the learned Judges would probably have decided that no adjudication could be made with reference to the member of an undivided Mitakshara family. In the matter of the petition of *Boopendra Narain Roy*[2] "It has been objected before us and apparently the judge seems to have been of opinion that Act XXXV of 1858 cannot and does not apply to members of a Mitakshara family. We are unable as at present advised to admit that as a correct proposition. It appears to us that there may be cases where it is essentially necessary that a guardian should be appointed for a member of a Mitakshara family as much as for a member of any other family. It is not necessary however, for us to decide that question because we think the application fails on other grounds." It was argued before the learned Judges that the application for adjudication in that case was made with a view to enforce partition of the share belonging to the alleged lunatic. Dealing with that argument the learned Judge observed. "Now, with respect to the supposition of the Judge that these proceedings were taken with the intention of ultimate proceedings for a partition without deciding whether or not a partition could be had under such circumstances, if the lunatic were declared a lunatic under the Act, it may be not improper to refer to the policy of the Lunacy Enactment in England. Under these Acts it has always been the policy of the Legislature not to interfere with the course of inheritance of the lunatic's property, and provisions for that purpose have been inserted into these Acts, so that even when it is necessary, for payment of debts or otherwise, that the lunatic's real property should be sold, it is provided that the surplus monies should be considered as in the same condition as if invested in land, leaving them heritable as if they were land. Possibly therefore,

1. (1895) I. L. R. 20 B. 659. 2. (1880) I. L. R. 6 C. 539 at 541

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even if an application for partition were made, it might be refused in accordance with that policy." If the Court would refuse a partition at the instance of the manager of a lunatic, then it is difficult to see what object would be served by the appointment of a manager for his undivided share in the estate.

The learned Judges do not point out in what circumstances it would be permissible to appoint a manager for a lunatic co-parcener of an undivided family. In several cases the Indian Courts have held that a guardian cannot be appointed under the Guardians and Wards Act for an undivided member of a Mitakshara family. See *Sham Kuar* v. *Mohananda Sahay*[1] *Virupakshappa* v. *Vilgangava*[2] *Bhaund Prasad* v. *Dhiraji Kuar*[3]. That question is really concluded by the opinion of the Privy Council in *Ghasib-ul-lah* v. *Khalak Singh*[4]. Sir Arthur Wilson, delivering the judgment of their Lordships in that case, observed: "It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of the member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property." These ovservations are, in my opinion, equally applicable to the appointment of a manager for a lunatic co-parcener in a Mitakshara family. The question then is, can a different view be taken with respect to the Karnavan of a Malabar tarwad? Mr. T. R. Ramachandra Aiyar, the learned vakil who appears for the appellants, has strenuously contended that the Karnavan should, for all practical purposes, be regardrd as the owner of the property: and that although in theory the property of a tarward may be vestad in all its members the ownership of the others is practically worthless, their substantial rights being confined to the receipt of maintenance and to prevent the Karnavan from wasting or misusing the property of the tarwad. Whatever may be the extent of the Karnavan's powers of management, I cannot doubt that the tarwad property is not, to use the language of the Privy Council, the individual property of the Karnavan, and that a manager appointed for him will obtain no rights over the tarwad property. Observations are, no doubt, to be found in *Varanakot Narayana Namburi* v. *Varanakot Narayanan Namburi*[5], which might encourage the notion that the property

1. (1891) I. L. R. 19 C. 301. 2. (1892) I. L. R. 19 B. 309.
3. (1898) I. L. R. 20 A. 400. 4. (1903) I. L. R. 7 C. W. N. 681.
5. (1880) I. L. R. 2 M. 328.

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of a tarwad is vested in the Karnavan. The question in that case was, whether a decree obtained against a Karnavan in a properly contested suit would be binding on the other members. It was with reference to that question that *Kernan* J. observed that the tarwad property was vested in the Karnavan and that he had large powers of dealing with it. This observation was referred to in *Vasudevan* v. *Sankaran*[1] where also the question was similar to that raised in *Varanakot Narayana Namburi* v. *Varanakot Narayana Namburi*[2] *Subramanya Aiyar*, J. observed: "The family property is not liable to partition except with the consent of all, the right of the members, other than the Karnavan, being practically limited to claim maintenance and to prevent the Karnavan from wasting or improperly alienating the family property; and the title to hold possession of the estate and to receive and expend its income is vested in the Karnavan, not by the sufferance of the other members, but of right which is indefeasable so long as he exercises his functions without injury to the family. Therefore, according to the substantive law to which he is subject, a Karnavan is necessarily the natural representative of the family in all matters concerning it as between it on the one hand and outsiders on the other." These observations, understood with regard to the context, cannot, in my opinion, be taken to lay down that the Karnavan has any larger right of ownership than any junior member over the tarwad property. What is vested in him according to the learned Judge is the right "to hold possession of the estate and to receive and expend its income;" and this right, he observes, is one not derived by appointment or sufferance of the other members, but under the law of the land." The Karnavan's power of management, extensive as it may be, is, in my opinion, in no respect, different in character from that of the managing member of a Mitakshara family. The only difference between the latter and the Karnavan of a Malabar tarwad arises from the fact that partition cannot be enforced except with the consent of all the members. But the substantive right of the Karnavan in the tarwad property is of exactly the same character as that of the managing member of a Mitakshara family.

In *Narayani* v. *Govinda*[3], it was pointed out by this Court that the Karnavan has no higher rights over the income of the tarwad than any other members. The equal ownership of all the members was also recognized in *Moidin Kutti* v. *Krishnan*[4]. In *Kunichekkan* v. *Lydia Arukendan*[5], I have referred to other cases in

1. (1896) I. L. R. 20 M. 129. 2. (1880) I. L. R. 2 M. 328.
3. (1874) I. L. R. 7. M. 352. 4. (1887) I. L. R. 10. M. 322.
5. (1912) M. W. N. 386.

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which the same view was adopted. My obesrvations in *Kalliani Amma* v. *Govinda Menon*,[1] do not, I think, throw any doubt on the equal ownership of all the members of a tarwad. The question in that case was whether the Karnavan had the right to claim the actual possession and custody of all the property of the tarwad against any other member who might take possession of any part of it, and I expressed the opinion that he had the right. There can be no doubt that both in a Malabar family and in a Mitakshara family, so long as it remains undivided, the manager is the person entitled to the actual possession of all the property of the family, although in the case of a Mitakshara family this right is of comparatively small value because a partition could be enforced by any of the co-parceners at his will. The case of *Kenath Puthen Vittil Tavazhi* v. *Narayanan*[2] merely laid down that the Karnavan was not bound to account to the other members or to pay them the surplus profits. This really has no bearing on the question of the equal ownership of all the owners. The case cannot be taken to lay down that the Karnavan himself has any right to use the surplus profits for his own purposes. This he has not, as pointed out in *Narayani* v. *Govinda*.[3] He has the right to dispose of the income for the benefit of the members of the tarwad, and, as the manager, he has considerable discretion in the actual distribution of the income. The right to distribute, however, can be exercised only in the interest of the tarwad and of its members, and unequal distribution cannot be supported on the larger right of any one member to the income than of any other. Ordinarily, no doubt, the right of a junior member would be to receive maintenance and to prevent waste of the tarwad property. But the equal ownership of all is demonstrated by the fact that the members by joining together may divide the property between themselves. If a Karnavan wastes tarwad property, it has been held that a junior member may recover the property for the use of the tarwad a position inconsistent with anything but his right of ownership. The Karnavan's rights of management may be modified by a *Karar* entered into by all the members of the family. The members concurring with each other may dispose of the property as they please. The right of disposition is the crucial mark of ownership. If any one of the members does not join in the alienation, unless justified by family necessity, it would be invalid because the ownership is as much in any one dissenting member as in all the other members together.

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1. (1911) 22 M. L. J. 23. 2. (1904) I. L. R. 28 M. 182.
3. (1884) I. L. R. 7 M. 352.

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It is impossible for me to come to any other conclusion than that the property of a tarwad is not the *individual* property of the Karnavan and that is the test, according to the view of the Privy Council, which must decide whether a guardian can be appointed under the Guardians and Wards Act, and, as I take it, a manager under Act XXXV of 1858. As observed by their Lordships, a manager appointed would obtain no right of management over the property of the tarwad, but only over the individual property of the lunatic for whom he is appointed. The appointment of a manager, therefore would be absolutely of no use. If the Karnavan becomes a lunatic, then the next senior member of the tarwad has the right to succeed to the management. How then can the court displace that right by appointing a stranger? If the court could appoint a manager, it may appoint any one to that position. It is unnecessary to consider whether lunacy would automatically work a forfeiture of the karnavan's right of management, or whether it would be necessary to get him removed by court. It is quite clear that in either case lunacy would be conclusive ground on which the next *Anandravan* could claim to have the Karnavan removed. Such a right cannot be prejudiced by any appointment of a manager under Act XXXV of 1858. It would, therefore, be absolutely useless to take any proceedings under that Act. It was pointed out that the Karnavan has large powers, and that the powers vested in a lunatic may be exercised by his manager. Apart from the answer already given, namely, that the right of junior members could not be affected by any order made under Act XXXV of 1858, I should observe that a power which may be exercised by a lunatic's manager must be a power attached to his beneficial estate. See Halsbury's Laws of England, Vol. 19, page 449. The right of management of a Karnavan of a tarwad and the powers attaching to that right are not incidental to the Karnavan's beneficial right in the tarwad property, but to his being the seniormost member of the tarwad, or to his being allowed to be the manager by the tarwad including the seniormost member. His beneficial interest, as already pointed out, is no more than that of any other member and does not carry any powers which the Karnavan could exercise in virtue of it.

I am, therefore, of opinion that the order of the lower court is right and that the appeal must be dismissed with costs.

Sadasiva Aiyar J:—23 out of the 28 junior members of a Malabar tarwad applied to the District Court of South Malabar, under the Lunacy Act XXXV of 1858, for a declaration that their old

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Karnavan (Chathu Nair) was of unsound mind and for the appointment of a manager of his properties and of a guardian for his person. The District Court refused to grant their prayer and hence they have appealed to this court.

(2) The alleged lunatic has evidently no property except what he was managing as Karnavan of the tarwad. This application to the District Court was made, not because the bowels of compassion of the petitioners were moved towards their Karnavan by his alleged lunacy or because they wished to protect the Karnavan (who has one foot in the grave, being nearly 90 years old). The 4th para of the petition is as follows:—"As the (tarwad) properties are not properly managed" owing to the Karnavan's lunacy, the petitioners are put to great hardship and inconvenience as they do not get their maintenance and other expenses. Besides this, it is likely that the properties to which the petitioners are also entitled will be wasted."

(3) The District Judge's reasons for dismissing the petition are as follows:—"A consideration of the (Lunacy). Act XXXV of 1858 shows that the property of which the person alleged to be a lunatic (is possessed of) should belong to the lunatic and that it is not intended that the court should deal with joint family property nor interfere in the affairs of a joint family. In *Tirmbacklal Govindas* v. *Hiralal*[1] it was held that the Act provides no machinery nor does it confer any power upon the court to deal with joint family property or interfere in the affairs of a joint family. In the analogous case of the appointment of a guardian under the Guardians and Wards Act of 1890, it has been held that a guardian cannot be appointed of the property of a minor who is a member of a joint Hindu family governed by the Mitakshara law and possessed of no separate property. *Sham Kuar* v. *Mohanunda Sahay*[2]" "*A fortiori* does this reasoning apply in the case of a Karnavan of a Malabar tarwad in which partition cannot be demanded." "I do not think that it is desirable that the provision of the Lunacy Act should be invoked to remove the head of a tarwad from office when the obvious and ordinary remedy of suing for his removal is available to the members of the tarwad. It is not improbable that the petitioners have devised an inexpensive method of attaining their object by means of this petition."

(4). The appellants' learned Vakil attacked the District Judge's above observations at great length, but has left me unconvinced that there is any flaw in the reasoning of the learned District Judge

1. (1895) I. L R. 20 B. 659. 2. (1891) I. L. R. 19 C. 301.

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whose language I adopt *in toto.* Act XXXV of 1858 was enacted "to make better provision for the care of the estates of lunatics," and not to enable junior members of a tarwad to deprive their Karnavan of his powers of management by charging him with lunacy. Act XIV and XL of 1858, (which were repealed by the consolidating and Amending Act VIII of 1890), were passed in the same year as the Lunacy Act XXXV of 1858 to protect the estates of minors. The analogous provisions in those Acts have been construed as not applying to cases of minors who are members of a joint Hindu family and whose only property is their undivided share in the joint family property. See *Gourab Kooeree* v. *Gujadar Purshad*[1], *Sheo Nunden Singh* v. *Mussamut Ghum-Sahoy Kooeree*[2], *Mussamut Aghola Kooeree* v. *Baboo Digamber Singh*[3] and *Sham Kuar* v. *Mohanunda Sahay*[4], *Ghasib-ul-lah* v. *Khalak Singh*[5]. A member of a Malabar tarwad is in a position worse than that of a male member of a joint Hindu family in two respects.

(a) A tarwad member, even if he was the Karnavan, cannot enforce partition by suit and no partition of tarwad property can take place unless by a family arrangement assented to by all the members, whereas a male member of a Hindu co-parcenary can always sue for partition. (The suit can be brought even on behalf of a minor member if the court could be persuaded that it is for the minor's benefit, viewed in a broad sense, that the suit should be conducted.)

(b) A tarwad member cannot alienate for his own private purposes a particular fraction or share of the tarwad property as belonging to him, while a Hindu joint family co-parcener could do so.

I am, therefore, clear that Act XXXV of 1858 was not intended to authorize courts to entertain proceedings under it in respect of an alleged lunatic who is a member of a Malabar tarwad or of a joint Hindu family and owns no separate property. Though the learned Judges who decided *Trimbaklal* v. *Hiralal*[6] say that they 'express no opinion upon this general question, the inclination of their opinion seems clear. I do not agree with the *obiter dicta* in 'In the matter of the petition of *Bhoopendra Narain Roy*[7] and *Soobanse Singh* v. *Juggesspur Koer*[8] that Act XXXV of 1858 may be applied to a member of a Mitakshara family who owns no separate property. I however, agree entirely with many of the other

1. (1879) I. L. R. 5 C. 209.
2. (1874) 21 W. R. 143.
3. (1875) 23 W. R. 206.
4. (1894) I. L. R. 19 C. 301.
5. (1903) 7 C. W. N. 681 (P.C.)
6. (1895) I. L. R. 20 B. 659.
7. (1880) I. L. R. 6 C. 539.
8. (1883) 13 C. L. R. 86.

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observations in the first case. One such observation is that sufficient cause must be made out by the petitioners for putting the Lunacy Act into operation against an individual alleged to be a lunatic, such sufficient cause being not certainly the benefit to the petitioners but the lunatic's benefit' and 'the proper protection and care' of his, person and of his properties. In construing the provisions of statutes relating to minors and lunatics, the paramount consideration is the benefit of the disqualified person. I am of opinion that it would be an abuse of the powers granted to the court by the Lunacy Act to exercise such powers in the interests of persons other than the alleged lunatic. Further if (as the petitioners allege) the old Karnavan Chathu Nair has become a lunatic, he has become civilly incapable of holding the office of Karnavan and the next senior Anandravan *ipso facto* has become the head of the family entitled to possession and management of the tarwad properties. Chathu Nair has ceased to possess even the right of management of the family property and the Lunacy Act which could only be invoked where the lunatic has got property becomes wholly incapable of application. It was argued that as a Karnavan who becomes blind does not loose his position merely by reason of his blindness, a Karnavan who becomes a lunatic does not lose his right to manage as Karnavan. There is absolutely no analogy between the two cases. A minor or a lunatic cannot be a Karnavan. If a Karnavan dies and the next senior male is the minor or a lunatic, he cannot succeed to the office at all, where as if he is merely blind, there is no legal objection to his succeeding. If his blindness is shown to have led to gross incompetency in management, he might be removed but a minor or lunatic can never hold the office at all till the minority ceases or the lunacy is cured. Lunacy deprives a man of all legal competence to contract or to manage affairs and the lunacy of even one partner dissolves the partnership (section 254 (1) of the Contract Act.) If the Karnavan is the agent or Karta of the tarwad, his powers as agent ought to terminate on his becoming of unsound mind (compare the provision in section 201 of the Contract Act, which of course does not directly apply.) To hold that a Karnavan who can become such only if he is an adult of sound mind and who has to represent the tarwad as its managing member could continue to be Karnavan and to possess the powers of representing the tarwad when he has become a lunatic seems to be a contradiction in terms.

In the result, I agree with my learned brother that the appeal fails and must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—The Honourable Sir Charles Arnold White, Chief Justice and Mr. Justice Sankaran Nair.

Ramakrishna Mallay ... *Appellant.** (*Plaintiff*).

v.

Baburaya *alias* Venkatesha Hegade and other. } *Respondents.* (*Defendants*).

Landlord and tenant—Non-payment of rent—Relief against forfeiture—Plea of payment not proved—Lease prior to 1882.

Rama-krishna *v.* Baburaya.

In the case of leases before the Transfer of Property Act, it is not necessary that in order to work out a forfeiture the landlord should prove that he intended to avail himself of the forfeiture by some act of his.

The question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of each case.

The fact that the tenant set up a plea of payment of rent and failed to prove, does not necessarily, in itself, disentitle him to equitable relief against the forfeiture.

Second Appeal from the decree of the Court of the Temporary Subordinate Judge of South Canara in Appeal Suit No. 376 of 1908, presented against the decree of the Court of the District Munsif of Karkal in Original Suit No. 141 of 1908.

B. Narasimha Row for *K. Ramanath Shenai* for appellant.

K. P. Madhava Row and *K. P. Lakshmana Row* for respondents.

B. Narasimha Row. In the case of a forfeiture incurred in a lease before the Transfer of Property Act no specific act determining the tenancy is necessary to enable one to bring a suit in ejectment *Padmanabhaya* v. *Ranga*,[1] the forfeiture in the case being non-payment of rent and alienation. Even S. 114 T. P. Act which relieves against forfeiture for rent has been strictly construed. Sub-letting is an alienation or vacating. S. 1018 of 1892 unreported which is against this view is wrong.

K. P. Lakshmana Row. There is no forfeiture on the true construction of the lease, on account of non-payment of rent. Even if there was a forfeiture the clause is penal in that it says that even if a very small amount remains unpaid there shall be a forfeiture and there is no period of grace.

The case first came on before their Lordships the Chief Justice (Sir Arnold White) and Mr. Justice Ayling on the 11th April 1911 who made the following.

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*S. A. No. 1425 of 1912. 13th November 1912.

1. (1910) I. L. R. 34 M. 161.

Rama-
krishna
v.
Baburaya.

ORDER :—We agree with the Courts below that on the true construction of the lease (Exhibit A) the sub-lease by the first defendant's father did not work a forfeiture. The Lower Appellate Court in holding that, assuming there was a forfeiture by reason of non-payment of rent, it could not be enforced as the plaintiff had not done any act to show he intended to avail himself of the forfeiture, would seem to have followed the decision of this court in *Venkatramana Bhatta* v. *Gundaraya*[1]. In that case, however, it was not brought to the notice of the Court that the lease in question was prior to the coming into operation of the Transfer of Property Act. The lease in the present case, was made in 1871 before the Transfer of Property Act came into operation and this being so, according to the decision in *Padmanabhaya* v. *Ranga*[2] an act on the part of the landlord showing that he elects to take advantage of the forfeiture is not a condition precedent to his right to sue in ejectment. There is no finding by the Lower Appellate Court as to whether, on the construction of the lease, non-payment of rent operated as a forfeiture. We accordingly send back the case to the Lower Appellate Court for a finding on this question and also, if the Court holds there has been a forfeiture by reason of the non-payment of rent, for a finding as to the terms, if any, on which the defendant is entitled to be relieved against the forfeiture. The findings should be submitted within one month after the reopening of the Sub-Court, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of South Canara submitted the following.

FINDING :—The two issues on which this Court has been directed to submit its findings are (1) Whether on the construction of the lease non-payment of rent operated as a forfeiture ? (2) If there has been a forfeiture by reason of the non-payment of rent, whether the defendant is entitled to be relieved against it on any and what terms ? The stipulation in question in the suit lease A is to this effect " I have no cause whatever either..........................or to keep the rent in arrears. In case any small portion of the aforesaid rent is kept in arrears or in case...............I shall deliver back the said land etc., and all to you without demanding from you the value of the improvements made by me." As observed in VI Madras 159, from the circumstance that the stipulation in question is that, if any portion of the rent should fall into arrears, the property should be surrendered with all right to improvements (*i.e.*,) without claiming the value of improvements, it might be reasonably inferred that such provision was made in order that it might operate as a fear in the mind of the lessee that the rent should be

1. (1907) I. L. R. 31 M. 403. 2. (1910) I. L. R. 34 M. 161.

regularly paid and the parties did not seriously intend that it should be acted upon. In a word, this stipulation was inserted *in terrorem* (see also VI Madras High Court Reports page 258).

2. Further, there is this important fact that the lease does not provide for any period of grace in respect of the payment of arrears of rent. It has been settled beyond any doubt or controversy that, when such is the case, the forfeiture arising from non-payment of rent will be one that can be relieved against (*Vide Mahalakshmi Amma* v. *Lakshmi*[1] *Narayana Naicker* v. *Vasudeva Bhatta*[2], *Narayana Kanti* v. *Handu Shetty*[3] and *Adiraja Shetty* v. *Billa Tyampu.*[4] Having regard to the intention of the parties, which can be gathered and reasonably inferred from the insertion of such stipulation as the one in question, and also to the circumstance that the lease provides for no period of grace, I should hold that the forfeiture under consideration is one that can be relieved against. The defendants are entitled to have such equitable relief granted to them.

3. Before the defendants can claim such equity, they must be prepared to do equity. It will be incumbent upon them to pay up the arrears of rent due by them. The 2nd defendant pleaded discharge. The 2nd issue in the case was " whether the payments of rent and thirva pleaded are true." There was no evidence to prove that issue and it was found in the negative. The rent claimed by the plaintiff is due to him. The defendants not only failed to tender it in Court but also set up a false plea of discharge. The plaintiff will be entitled to get the arrears of rent due to him and that with interest. Having regard to the fact that there was no tender on the part of the defendant even after the suit was brought—but he, on the other hand, falsely pleaded payment, it will not be unreasonable or inequitable to allow plaintiff interest at the rate of 12 per cent. per annum. Plaintiff will also be entitled to get his full costs of the suit, including the costs on the claim for recovery of possession of the suit property (*vide Subbaraya Kanti* v. *Krishna Kanti.*[5])

4. For paying up the plaintiff the arrears of rent claimed by him with interest thereon at 12 per cent. per annum from the date on which the rent fell due up to the date of payment and also full costs, some reasonable time will have to be allowed to the defendants. Under the circumstances I am of opinion that it will be sufficient if 3 weeks' time from the date of disposal of this second appeal in the High Court is allowed to them. There will be no loss or inconvenience to the plaintiff as he gets interest at the aforesaid rate up to the date of payment. If the defendants, with a view to avoid the burden of paying interest, wish to

1. (1911) 21 M. L. J. 960.
2. (1903) I. L. R. 28 M. 389.
3. (1901) 15 M. L. J. 210.
4. (1910) 20 M. L. J. 944.
5. (1882) I. L. R. 6 M. 159.

Rama-krishna v. Baburaya.

pay up the amount earlier they will be at liberty to pay it to the plaintiff through Court.

5. For the reasons set forth above, I find on these two issues that if the Defendant should pay up what is mentioned *supra* within the time specified therein, they would be entitled to have the forfeiture in question relieved against.

The case came on before the Bench constituted as above.

Judgment:—The question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of the particular case. Here we think on the authority of the decision in *Subbaraya Kanti* v. *Krishna Kanti* [1] following *Kottal Uppi* v. *Edavalath Thathan Nambudiri*[2], the tenant is entitled to relief. The cases relied on by the plaintiff (the landlord) are distinguishable. In *Narayana Kanti* v. *Handu Shetty*[3], a long period was allowed, some eight months, after default, before the forfeiture was to take effect and, apparently, there was no stipulation that the tenant should, on default, lose the value of his improvements. In *Mahalakshmi Amma* v. *Lakshmi*, [4] a period of grace was also allowed. There was no doubt a stipulation in that case that the tenant, on default, should lose the value of his improvements but the effect of this stipulation is not discusssed in the judgment.

We do not think the fact that the tenant sets up a plea of payment which he fails to prove, necessarily, in itself, disentitles him to equitable relief.

We accept the finding and modify the decree of the Lower Appellate Court in accordance with the finding. The plaintiff is entitled to his costs throughout.

In default of payment of rent and interest within the time allowed, the plaintiff may recover possession.

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1. (1882) I. L. R. 6 M. 159
2. (1871) 6 M. H. C. R. 258.
3. 1910) 15 M. L J. 210.
4. (1911) 21 M. L. J. 960.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White Chief Justice and Mr. Justice Benson.

Arunachalam Pillai Minor by father and guardian Vadivelu Pillai and another ... ... *Defendants (Appellants).**

v.

Vellaya Pillai and another... *Plaintiffs* 3 & 4 (*Respondents.*)

Hindu Law—Reversioner's suit to set aside adoption—Suit by mother against widow—Death of plaintiff's mother—Abatement—Legal representative—Reversioners not.

A suit by the mother of the last male owner to set aside an adoption by the widow abates on the mother's death.

Aruna-chalam *v.* Vellaya.

The cause of action in a suit by a reversioner does not survive on his death to another reversioner and there is no distinction in this matter between a suit to set aside an adoption and a suit to set aside an alienation : *Chiruvolu Ponnamma* v *Chiruvolu Perraju*[1] distinguished.

The reversioners of the last male owner are not the legal representatives of the mother of the last owner who brought a suit to set aside an adoption and subsequently died.

"Devolves" in S. 211 C. P. C. means has devolved.

Second Appeal from the decree of the District Court of Madura in Appeal Suit No. 841 of 1909 presented againt the decree of the Court of the District Munsif of Dindigul in Original suit No. 678 of 1906.

T. V. Seshagiri Aiyar for appellants.

T. Rangachariar and *M. K. Narayanasami Aiyar* for respondents.

The Court delivered the following

Judgment :—This is a suit by the widow (the mother of the last male owner) for a declaration that an adoption by her son's widow is invalid. The plaintiff died before the suit came on for hearing in the court of first instance. Reversioners of the last male owner were made parties as the legal representatives of the deceased plaintiff. The only question argued on the hearing of the appeal was—can they continue the suit ? The courts below were of opinion that they could. We are unable to take this view.

The first question for consideration is does the deceased plaintiff's right to sue survive (Order XXII rule 3) ? If it does not, no question as to who are the legal representatives of the deceased plaintiff arises.

*S. A. No, 1384 of 1910. 30th April 1912.

1. (1905) I. L. R. 29 M. 390.

Aruna-chalam v. Vellaya.

It appears to be well settled that a suit by a reversioner who sues on his own behalf to set aside an alienation by a widow abates on the death of plaintiff and that the right to sue does not survive to the next reversioners (see *Sakyahani Ingle Rao Saheb* v. *Bhavani Bozi Saheb*[1], *Chinna Veerayya* v. *Lakshmi Narasamma*[2]). In *Muthusawmy Mudaliar* v. *Masilamani*[3], where the suit was held not to abate the plaintiff sued on behalf of all the reversioners as well as on his own behalf. The Lower Courts were of opinion in view of the decision in *Chiruvolu Ponnamma* v. *Chiruvolu Perraju*[4] that for the purposes of the question before us a distinction should be drawn between a suit for a declaration to set aside an alienation and a suit for a declaration to set aside an adoption. What was actually held by the Full Bench in *Chiruvolu Ponnamma* v. *Chiruvolu Perraju*[4], was that in a suit to set aside an adoption as distinguished from the suit to set aside an alienation the presumptive reversioner ought on principle to be held to represent the remote reversioner if the matter is decided after a fair trial. The respondent relied on observations of the court in *Chiruvolu Ponnamma* v. *Chiruvolu Perraju*[4], that there was only one cause of action to be sued on. This observation was made with reference to suits to set aside alienations. Notwithstanding this in *Chinna Veerayya* v. *Lakshmi Narasamma*[2], the learned judges held as we think rightly that in a suit by reversioner on his own behalf to set aside an alienation the right to sue does not survive. All that was decided in *Chiruvolu Ponnamma* v. *Chiruvolu Perraju*[4], was that if there had been a fair trial an adjudication in a suit made by a reversioner to set aside an adoption is binding on the other reversioners. This is not inconsistent with the rights of the reversioners being independent rights. Their rights remain subject to the rule of law laid down in *Chiruvolu Ponnamma* v. *Chiruvolu Perraju*[4]. It is not a question whether there is a cause of action in the reversioners other than the deceased plaintiff but whether the plaintiff's right to sue survives. In *Premmoyi Chowdrani* v. *Preonath Dhur*[5], it was held that the right to sue survives. There the claim was to recover possession of property. The Calcutta case may perhaps be distinguished on this ground. If it cannot, it apparently cannot be reconciled with the Madras decisions to which we have referred.

For the purposes of this question it seems to us that no distinction should be drawn between suits to set aside an adoption and suits

1. (1904) I. L. R. 27. M. 588. 2. (1912) I. L. R. 22 M. L. J. 375.
3. (1909) I. L. R. 33 M. 342. 4. (1905) I. L. R. 29 M. 390.
5. (1896) I. L. R. 23 C. 636.

to set aside an alienation and we are of opinion the plaintiffs' rights to sue did not survive.

Aruna-chalam v. Vellaya.

It seems desirable to deal with the further question. Assuming that the cause of action survives are the parties who have been added as plaintiffs—the reversioners of the last male owner—the legal representatives of the deceased plaintiff? In the strict sense of the words, of course they are not. The meaning of the words however has been extended by judicial decisions and in the Code of 1908 a definition of the words was for the first time introduced apparently with the object of embodying the effect of the judicial decisions. The definition is contained in section (2) ii and is as follows:— "Legal representative" means a person who in law represents the estate of a deceased person and includes any person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party suing or sued."

Can the words 'deceased person' in the present case be construed as meaning not the deceased plaintiff but the last male owner? We think the deceased person is the late plaintiff and although in a sense the deceased represented the reversioners it cannot be said that the reversioners of the last male owner in law represent the estate of the deceased plaintiff. Then assuming that the deceased plaintiff is suing in a representative character can it be said that the parties added as plaintiffs are the persons on whom the estate devolves on the death of the deceased plaintiff? Here "estate" apparently means the estate of the last male owner. We think "devolves" means 'has devolved' and not would in the course of time devolve in accordance with the time of succession on the parties who have been added as plaintiff, if they were alive.

In the present case the estate will not devolve on the parties who have been added as plaintiff till after the death of the son's widow.

In *Rikhai Rai* v. *Sheo Pijan Singh*,[1] which was relied on by the respondents the suit was for possession and the estate devolved on the death of the original plaintiff on the reversioners who were added as parties.

We must set aside the decrees of the Courts below and dismiss the suit with costs throughout.

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1. (1910) I. L. R. 33 A. 15.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar.

Yeditha Subbaya ... *3rd Accused in C. C. No. 189 of 1911 on the file of the 2nd Class Magistrate of Kottapeta—Petitioner.*

v.

Emperor.

Penal Code Ss. 406, 114—Essentials—Meaning and scope—Criminal Procedure Code. Ss. 236, 337, 238—*Charge for principal offence and conviction for abetment.*

Subbaya *v.* Emperor.

Entrustment of the object matter is a necessary element of the offence of criminal breach of trust; and there can be no criminal breach of trust by a person of a jewel entrusted to a third person.

S. 114 of the Penal Code is applicable only where the act at the doing of which the abettor is present would itself amount to an offence. The section is not applicable to the case of a person abetting the pledging of a thing entrusted to a stranger.

There is no universal rule that in no case there can be a conviction for abetment where the charge was only for the principal offence. The question is what were the facts charged. If, on the facts, two charges *i.e.* for the commission of the principal offence and the abetment can be framed, then the accused can be convicted of abetment though not charged separately. If the facts constituting the principal offence and the abetment are different as they generally are, then the conviction cannot be for abetment on a charge for the principal offence.

Petition under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the Judgment of the Joint Magistrate of Rajmundry in Criminal Appeal 12 of 1912 confirming the conviction and sentence passed upon the petitioner by the 2nd Class Magistrate of Kottapeta in Calender Case No. 189 of 1911.

G. Venkataramiah for Accused.

The Public Prosecutor for the Crown.

The court delivered the following

Judgment:—The Petitioner in this case was the 3rd accused in Calender Case No. 189 of 1911 on the file of the 2nd class Magistrate of Kottapeta. The first accused was a dancing girl and the 3rd accused is said to have kept her. The facts on which the prosecution was based were that the complainant lent a jewel to the 1st accused; this jewel was subsequently pledged by the 2nd and 3rd accused to the 6th prosecution witness. The money obtained by the pledge was apparently appropriated by the 2nd accused. The jewel was given to the 2nd accused for being pledged. There can be no doubt that the 2nd and 3rd accused had no right to pledge

*Cr.R.C. No. 191 of 1912 & Cr.R.P. No. 153 of 1912. 3rd May 1912.

the jewel. Both Courts have found as a fact that the 3rd accused was aware that the jewel did not belong to the 2nd accused and that he introduced the 2nd accused to the 6th prosecution witness, as a relation of his in order to induce the witness to give a loan to the 2nd accused on the pledge of the jewel. Both of them acted at the instance of the 1st accused who gave the jewel. On the facts the Lower Courts have convicted the 3rd accused of criminal breach of trust. Subbaya v. Emperor.

It is contended that the conviction cannot be upheld as there was no entrustment of the jewel to the 3rd accused. Entrustment of the jewel to the third accused is, according to section 406 Indian Penal Code a necessary element of the offence of Criminal Breach of Trust. It is urged by the learned Public Prosecutor that by confirming with the first and 2nd accused to pledge the jewel with prosecution witness 6, the 3rd accused would be guilty of abetment of criminal breach of trust; and that as he was present at the act of pledging he would be also guilty of the principal offence itself under the provisions of Sec. 114 of the Penal Code. That section enacts whenever any person who being absent would be liable to be punished as an abettor is present when the act or offence for which he would be punishable in consequence of the abetment is committed he shall be deemed to have committed such act or offence. I doubt whether under this section a principal offence would be committed where one of the elements of the offence is a particular relationship between the abettor and the 3rd person who is absent in the case. The act of pledging may no doubt be taken to have been committed by the third accused also in consequence of his presence at the time when the 2nd accused did the act. The language of the section no doubt lends itself to the argument that wherever a person is guilty of an abetment his presence at the commission of the offence would make him guilty of the principal offence. But the section I think would really be applicable only where the act at the doing of which the abettor is present would itself amount to an offence. Now the mere pledging would not be an offence by itself. Another equally essential element is the entrustment. I am inclined to think that the mere presence of the 3rd accused at the act of pledging would not make him guilty of the principal offence of criminal breach of trust. But I see no reason why he should not be held to be guilty of abetment of criminal breach of trust. The facts charged against him were that he was a party to the pledging of a jewel which was entrusted to the 1st accused. On those facts a charge of abetment of criminal breach of

Subbaya *v.* Emperor.

trust could have been framed against him. I think the provisions of sections 236 and 237 of the Criminal Procedure Code are applicable to such a case. It was a question whether on the facts alleged the accused would be guilty of Criminal breach of trust or of abetment of that offence. Both charges could have been framed against him on the facts alleged by the prosecution and in such a case it is open to the court under Sec. 237 to convict the accused of the abetment of Criminal Breach of Trust, though no charge was framed against him for that offence. Mr. Venkatramiah relies on two cases in support of his argument that a person can in no case be convicted of the abetment of an offence when he was not charged with it, but only of the principal offence. The first of these cases is *Rex* v. *Chaukmen* and *Pir Bai Adamji*[1]. The offence charged against the accused there, was murder. Justice West held that he could not be convicted of abetment of murder. The learned Judge recognized that the question must be decided by a consideration of the provisions of sec. 238 and he rested his judgment on the ground that the facts necessary to prove abetment would not be included in the facts required to prove the principal offence. And the facts charged against the accused were only those that were required for the principal offence of murder. The learned Judge says "that section *i. e.*, the section corresponding to section 238 of the present Code, applies to cases in which the charge is an offence which consists of several particulars, a combination of some only of which, constitutes a complete minor offence. The graver charge in such a case gives notice to the accused of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when this is not the case where the circumstances embodied in the major charge do not necessarily and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principal no longer applies because notice of the former does not necessarily involve notice of all that constitute the latter. The section is not intended to apply to a collateral offence. It is not open to a court to find a man guilty of the abetment of an offence on a charge of the offence itself. When a man is accused of murder he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it, which may be quite distinct from the circumstances constituting the murder itself. Similar observations may be applied to sec. 236 also. It is quite true that if the facts are not the same, the accused cannot be convicted for another offence the elements of which are not all

1. (1874) I.L.R. 11 B. H. C. R. 240.

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included in the offence charged against him. Ordinarily the facts required to prove the abetment should not be included in the facts constituting the principal offence. The abetment would precede the commission of the principal offence itself where it consists of the abettor being a party to a consipiracy or in instigating the principal offence or helping in the commission of it. If he be present at the commission of the offence itself *he would ordinarily* be guilty of the principal offence. The abetment therefore would be complete before the principal offence is committed and the facts constituting the abetment need not be proved in order to prove the principal offence. No doubt in order to bring home the offence to any particular accused the facts preceding may be adduced in evidence which by themselves may make him the abettor. But when the charge is of the principal offence only it cannot be said that he has to meet facts which occurred before the principal offence. I entirely accept the law as laid by the learned Judge. The other case *Padmanaba Panji Kunniah* v. *Emperor*[1], really also proceeds on an application of the principle of sections 236 and 237 to the facts of that case. The offence charged there was forgery. The observations I have made with regard to the act constituting the abetment of such an offence would precede the commission of the act which make the offence itself, and a person who is charged only with the principal offence is not called upon to meet a charge which relates to acts done before it. I do not think that the learned judges who decided the case intended to lay down a universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence. The question is what were the facts charged? If on those facts two charges could be framed namely, the commission of the principal offence, and the abetment, then by virtue of provisions of section 237 the accused may be convicted of the offence of the abetment though it was not charged separately against him. The act lays down no specific provision with respect to the question decided here. But the principle is laid in sections 236 and 237 and applying that principle I must come to the conclusion that in this case the accused may be convicted of the abetment of criminal breach of trust. I accordingly alter the finding into one of guilty of the offence of abetment of criminal breach of trust. I see no reason to interfere with the sentence. This Petition is therefore dismissed.

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1. (1909) I.L.R. 33 M. 264.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

Present :—Mr. Justice Bakewell.

The Official Assignee of Madras ... ...*Plaintiff.**

v.

T. C. Ramaswamy Iyengar and another... ...*Defendants.*

Letters Patent Cl. 11 and 12—Suit for land—Suit to avoid an incumbrance on land.

Official Assignee of Madras *v.* Ramaswamy Iyengar.

A suit to avoid an incumbrance upon land is a suit for land within the meaning of S. 12 of the Letters Patent. The High Court in the exercise of its original jurisdiction is merely a local court and the general principle of construction applicable to an enactment conferring such a jurisdiction is that it must clearly appear that a case falls within the provisions of the enactment and jurisdiction cannot be extended by implication.

V. Masilamani Pillai and *P. Durasamy Iyengar* for the Plaintiff.

V. V. Srinivasa Iyengar and *C. P. Ramasawmy Iyer* for the 2nd Defendant.

The Court delivered the following

Judgment :—In November 1908 the 1st defendant presented his petition to the Insolvent Court, and in his schedule stated that certain immoveable properties situate in the North Arcot district had been mortgaged to the 2nd defendant by a deed of simple mortgage dated 23rd August 1906. The Official Assignee, the plaintiff in this suit, alleges that this deed is fraudulent and that he is entitled to avoid it, and in his plaint prays that the deed may be declared fraudulent and invalid and not binding on him and that the 2nd defendant may be decreed to deliver up the same duly cancelled.

The suit appears to be based upon sec. 53 of the Transfer of Property Act 1882, which enables a creditor to avoid a transfer of immoveable property made with intent to defeat or delay the creditors of the transferor ; such a transfer is not void but is voidable at the option of certain persons, that is to say, assuming that the plaintiff proves his case as regards all the world except the creditors of the 1st defendant and also as against them until they choose to exercise their option, the 2nd defendant possesses a mortgage interest in the land in question.

The plaintiff now seeks to exercise that option to avoid the 2nd defendant's mortgage and thus to clear the land which is now

*C. S. No. 101 of 1910. 23rd July 1912.

Official Assignee of Madras v. Ramasamy Iyengar.

vested in the plaint of an existing incumbrance. The 6th issue, raises the question of the jurisdiction of this Court to entertain this suit and by consent has been tried as a preliminary issue. Clause 11 of the Letters Patent of this court declares that it shall have and exercise ordinary original civil jurisdiction within such local limits as may...........be declared and prescribed " and clause 12 declares that " in the case of suits for land or other immoveable property such land or property shall be situate within the local limits."

The question for determination is therefore whether a suit to avoid an incumbrance upon land is a suit for land within the meaning of the Letters Patent.

It appears from the clauses of the Letters Patent which I have cited that the High Court in the exercise of its original civil jurisdiction is merely a local Court and the general principle of construction applicable to an enactment conferring such a jurisdiction is that it must clearly appear that a particular case falls within the provisions of the enactment, and that the jurisdiction should not be extended by implication. (See *Read* v. *Brown* [1] *Simpson* v. *Blues* [2] *Payne* v. *Hogg*)[3]. The object of the legislature is in fact to distribute the work of administering the law among certain tribunals which should not encroach the one upon the other. For this reason it appears to me that the well known cases in the English Court which deal with the question to what extent a Court of Equity will, as against a person subject to its process, enforce rights relating to property situate outside the kingdom, have little application to the present question.

The general intention of the legislature as declared in cl. 12 of the Letters Patent and section 16 of the Code of Civil Procedure, 1908, is that suits to establish or enforce any right to or interest in land should be brought in the Court within whose local jurisdiction, the land is situate see *Nalum Lakshmi Kantham* v. *Krishnasami Mudaliar*[4] and I think the burden is upon the plaintiff to show that the present suit is not a suit for land within the meaning of the Letters Patent.

A suit to get rid of an incumbrance on land appears to me a suit for land equally with a suit to enforce or obtain a charge upon land see *Nalum Lakshmi Kantham* v. *Krishnasami Mudaliar* [4], *Sundara Bai Sahiba* v. *Tirumal Row Sahib*[5], since in each

1. (1888) 22 Q. B. D. 128.
2. (1872) L. R. 7 C. P. 290.
3. (1900) 2 Q. B. 43.
4. (1904) I. L. R. 27 M. 157.
5. (1909) I. L. R., 33 M. 131.

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case the plaintiff claims an interest in the land and asks the Court to enforce his right; in the first case he asks for the entire interest in the land and in other cases for a partial interest only, and the former is therefore more clearly a suit for the land.

For these reasons I am of opinion that the 6th issue should be answered in the negative, and I dismiss the suit with costs of the 2nd defendant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar, and Mr. Justice Sadasiva Aiyar.

The Secretary of State for India in Council.	*15th Defendant. Appellant.* *
v.	
Ikkurti Subbarayudu and others.	*Plaintiffs Nos. 1 and 2nd 3rd Plaintiff's L. R. & Defendants Nos. 4& 5 Respondents.*

Madras Act III of 1895—S. 21—Scope of—Pensions Act S. 4—"Grant of land revenue"—Grants of land not to be split up into two grants of melvaram and Kudivaram—Madras Regulation VI of 1831—*Jurisdiction of Revenue Court—Emolument of office.*

Secretary of State for India v. Subbarayudu.

A grant of land cannot be split up into a grant of melvaram and a grant of kudivaram without words in the document to that effect. *Jeeyamba Bai* v. *Secretary of State*[1] distinguisded.

S. 21 of Madras Act III of 1895 cannot apply to a claim to recover what the plaintiff denies to be emoluments of an officer but which the defendant alleges to be such emoluments. *Kesiram Narasimhulu* v. *Narasimhulu Patnaidu*[2] distinguished.

Revenue Courts have no jurisdiction to decide what were the emoluments of an office or to decree possession against a person alleged to be a trespasser.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Guntur in Appeal Suit No. 150 of 1906 presented against the decree of the Court of the District Munsif of Narasarowpet in O. S. 125 of 1905.

The Government Pleader for appellant.

P. Narayanamurthi for respondents.

The court delivered the following

Judgment:—The plaintiffs in this suit claim to recover certain lands as belonging to them as an inam for the Archakathnam or worship of a family deity. They allege that they were dispossessed by defendants Nos. 1 to 3 in execution of a decree of the revenue

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*S. A. No. 329 of 1911. 24th July 1912.

1. (1912) 23. M. L. J. 687.
2. (1906) I. L. R. 30 M. 126.

Secretary of State for India v. Subbarayudu.

court in S. S. No. 1 of 1891. They impeach the decree as one passed without jurisdiction by the Revenue Court and therefore not affecting their rights. The 15th defendant is the Secretary of state for India in Council and was impleaded as a party in consequence of the contention raised by defendants Nos. 1 to 3. They allege that the lands appertain to the office of Karnam which is held by the 1st defendant and that plaintiffs have no right to recover them. They also deny the jurisdiction of the civil courts to entertain the suit. It is also contended that the plaintiffs' right is *res judicata* in consequence of the decision in S. S. No. 1 of 1891. A question of limitation was also raised in the lower courts but has not been argued before us. Both the courts have found that the lands are not Karnam service inam lands and that the the plaintiffs are owners. This finding has been attacked before us but we are unable to agree that the finding can be interfered with in Second Appeal. The Lower Appellate Court relied upon Ex. A a register of inams prepared in the year 1790 in which the lands are not shown to be Karnam inam lands. It is argued that the Subordinate Judge misconstrued Ex. A and understood it as showing that the lands were Archaka Inam lands. We do not think that the Subordinate Judge has committed any error in the construction of the document. He observes, plaintiff's grand-father Venkamarazu, worshipper of God is described in it as the hereditary grantee of 4½ Kuchalas of land as maniam. This observation is quite correct and it is quite clear that Ex. A. is consistent with the land being Karnam inam. He observes only that he is described as a hereditary grantee and it is not stated as holding the land as Karnam Service Inam. Assuming that Ex. VI is in favour of the appellant's contention the Subordinate Judge has taken the document into consideration and given it such weight as in his opinion it deserves. It does not appear that Government took any final action on the statement contained in Ex. VI. At any rate we cannot hold that the appellate court was bound to act on the contents of Ex. VI. We must therefore accept the finding that the lands belong to the plaintiffs and are not Karnam service inam lands.

The next question argued is that the civil Courts had no jurisdiction to entertain the suit. This argument is based on two grounds. The first ground is that section 4 of the Pensions Act applies. That section enacts that no civil court shall entertain any suit relating to any grant of land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such........................grant, and whatever may have been the nature of payment, claim or right for which such grant may have been substituted.". It was not the plaintiffs' case

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nor the case of defendants that inam whether it be a Karnam service inam or some other kind of inam consisted of land revenue. The plaintiffs alleged that the land itself is maniam and this position was not contested by any of the defendants. The suit is therefore not one relating to any grant of land revenue. The learned Government Pleader argues that when the land is granted the land-revenue is part of the grant and so far as the melvaram right is concerned the suit is not cognizable by the civil courts without a certificate from the Collector; but there is nothing to show that in the hands of the Government before the grant of the Inam the land was treated as liable for the payment of land revenue or that the Government intended to split up its ownership into melvaram and kudivaram or to make a distinct grant of the land revenue. The Government Pleader does not deny that the decisions of the High Courts would not support his contention except one *viz.*, the Judgment of his court in Appeal No. 10 of 1908. That case however lends no support to his contention. It is in reality against it. It is held that the suit in that case was not cognizable by the Civil Courts because it relates to a grant of land revenue. The instrument of grant, it was held, distinctly made of a grant of taxes due to the Government although it may have been that the kudivaram also was granted. The grant of kudivaram and melvaram was distinct and several. The earlier decisions under section 4 of the Pensions Act 1871 were all reviewed in that Judgment. The ratio of decisions was as already indicated that where the court is able to hold that there is a distinct grant of the land revenue itself a suit relating to it is not within the cognizance of the Civil Courts except with the sanction of the Collector. This argument must therefore fail.

The next question urged in support of the plea of absence of jurisdiction in the civil courts is that under Regulation VI of 1831 which was the statute in force when the suit No. 1 of 1891 was decided and section 21 of Act III of 1895 which repealed Regulation VI of 1831 and re-enacted the law applicable to hereditary village offices, this suit is excluded from the jurisdiction of the civil courts. We may deal with section 21 of Act III of 1895 as stress was particularly laid on the language of that section. It provides "that no civil court shall have authority to take into consideration or decide any claim to recover the emoluments of any such office." *i.e.*, any of the offices specified in section 3. Now what is taken out of the jurisdiction of the ordinary tribunal according to the language of that section is a claim to recover the emoluments of an office. The finding of the lower appellate court which we have upheld is that the lands in question are not emoluments of the office of Karnam. The

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expression "any claim to recover the emoluments of an office" mean a claim to recover what in effect are the emoluments of an office. It cannot in our opinion by any rule of construction be extended to include a claim to recover what the plaintiff denies to be the emoluments of an office but what the defendant alleges to be such emoluments. The decision of this Court in *Kesiram Narasimhulu* v. *Narasimhulu Patnaidu*[1], is strongly relied on by the Government Pleader. But that case is of absolutely no use to him. The learned Chief Justice says there "Reading the words 'emoluments of any such office' in section 21 in their ordinary sense they would as it seems to me, apply to a case in which the plaintiff sues to recover lands which he alleges are the emoluments of his office, this being denied by the defendants. The plaintiff's sole ground of action is that the lands sued for are the emoluments of his office, and it seems to me the claim is none the less a claim for the emoluments within the meaning of the section because the defendant denied that the lands in question constitute the emoluments." The reason underlying the decision apparently was that the plaintiff admitting that his claim was to the emoluments of an office could not take an advantage of the defendant's plea; in other words the plaintiff is bound by his own statement when the question is whether the suit is for the emoluments of an office. With respect to Regulation VI of 1831 it was held in *Ravutha Koundan* v. *Muthu Koundan*[2], that the Revenue Court had no jurisdiction to decide what were the emoluments of an office. Neither under Regulation VI of 1831 nor under section 21 of Act III of 1895 then, can it be held that Civil Courts are deprived of jurisdiction to try the present suit.

The next contention of the appellant is that the plaintiff is barred by the rule *res judicata* from enforcing his claim. According to the ruling in *Ravutha Koundan* v. *Muthu Koundan*[2] already referred to, the Revenue Court had no jurisdiction to decide what were the emoluments of an office or to decree possession against a person alleged to be a trespasser. We must therefore overrule this contention also.

The Second Appeal must substantially fail. We however, agree that the Secretary of State for India in Council who was never in possession of the land ought not to have been made liable for mesne profits and we modify the judgment of the Lower Appellate Court in so far it directs the 15th defendant to pay mesne profits. With this modification we dismiss the Second Appeal with costs.

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1. (1906) I. L. R. 30.M. 126. 2. (1888) I. L. R. 13 M. 41.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present —Mr. Justice Miller.

Angamuthu Vanathrian. { *Accused in Sessions Case No. 21 of 1912 on the file of the Sessions Court of Trichinopoly Division.

Angamuthu Vanathrian. *In re.*

Cr. P. C. S. 438—Report to High Court by District Magistrate of proceedings in Sessions Court.

District Magistrate cannot report proceedings of court of Sessions. *Emperor* v. *Jamna Bai* [1] and *Empress* v. *Jahamdi* [2] followed.

Case referred for the orders of the High Court under Section 438 of the Criminal Procedure Code by the District Magistrate of Trichinopoly in his letter dated the 23rd July 1912.

Public Prosecutor for accused.

The Court made the following

ORDER :—It has been held by all the High Courts that S. 438 of the Criminal Procedure Code does not warrant a District Magistrate in reporting to the High Court the proceeding of the Court of Sessions. Vide *Emperor* v. *Jamna Bai* [1] and *Queen Empress* v. *Jahamdi.*[2] There is an unreported case in the Bombay High Court to the same effect and in this Court. (High Court proceedings dated 21st September 85, No. 443.)

There is no material difference between the words of section 438 in the present Code and those of the same section in the former Code of 1882.

The District Magistrate, if he considers the Sessions Judge's order illegal should move the Public Prosecutor to bring it before this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.--Mr. Justice Sundara Aiyar and Mr. Justice Sadasiva Aiyar.

The Secretary of State for India in Council } (*Defendant*) *Appellant.*†

v.

Ramabrahmam ... ... (*Plaintiff*) *Respondent.*

Secretary of State for India *v.* Ramabrahmam.

" Small Cause Courts Act IX of 1887 art. 3—" Act purporting to be done " meaning of.

Art. 3 of the Provincial Small Cause Courts Act applies to suits relating to some distinct act done by an officer of Government etc. A mere failure to carry out a contract cannot be regarded as such an act. A suit for recovery of the contract amount due from the Government for the repair of a tank by a contractor is a suit of a small cause nature.

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*Cr. R. C. No. 357 of 1912 & C. R. No. 67 of 1912. 29th July 1912.

1. (1905) I. L. R. 28 A. 91. 2. (1895) I. L. R. 23 C. 251.

† S. A. No. 99 of 1911. 5th August 1912.

Secretary of State for India v. Rama-brahmam.

Second Appeal from the decree of the Court of Subordinate Judge of Kristna at Ellore in Appeal suit No. 470 of 1909 preferred against the decree of the Court of the District Munsif of Ellore in Original Suit No. 354 of 1907.

G. S. Ramachandra Aiyar for *Government Pleader* for appellant.

B. Somayya for *P. Narayanamurthi* for respondent.

The Court delivered the following.

Judgment:—The suit in this case was for recovering the amount due to the plaintiff under a contract entered into by him with the Government whereby he undertook to repair a tank and to build a pipe sluice. The plaintiff's case was that the plaintiff had performed his part of the contract and was entitled to the amount due to him under it. The defendant pleaded that the plaintiff had not carried out the work undertaken by him. The District Munsif dismissed the suit but on appeal the plaintiff got a decree in the Subordinate Judge's Court. Defendant appeals to this Court.

A preliminary objection is taken that no second appeal lies in this case as the amount sought to be recovered is Rs. 500 and the suit is of a small cause nature. It is contended for the defendant that a suit of this kind is exempted from the cognizance of the Small Cause Court by Art. 3 of the II Schedule of the Provincial Small Cause Courts Act. That article is in these terms. "A suit concerning an act or order purporting to be done or made by any other officer of Government in his official capacity or by a Court of Wards or by an officer of a Court of Wards in the execution of his office." The question is whether this can be regarded as a suit concerning an act purporting to be done by an officer of Government in his official capacity. We are of opinion that it cannot. The article applies to a suit relating to some distinct act done by an officer of Government. We do not think that a mere failure to carry out a contract can be regarded as such an act. In *Rajmul Manichund* v. *Hanmant Anhaya* [1] it was held that the expression "an act purporting to be done" in section 80 of the Civil Procedure Code was not applicable to the failure to perform a contract. *Chhaganlal Kishoredas* v. *The Collector of Kaira* [2] merely held that section 80 was not confined in its operation to torts but was applicable wherever there was a distinct act done by an officer of Government. In that case there was a declaration made by an officer in virtue of a power vested in him under a statute and that was held to amount to an act. In

1. (1895) I. L. R. 20 B. 697. 2. (1910) I. L. R. 35 B. 42.

Secretary of State for India v. Rama-brahmam.

Bunwari Lal Mookerjee v. *The Secretary of State for India* [1] the Calcutta High Court held that a suit for compensation for damages for injury done to an article of the plaintiff carried by a State Railway did not come within the purview of Article 3 and was cognizable by a Small Cause Court. In *Mothi Rungayya Chetty* v. *The Secretary of State for India in Council* [2] this Court held that a suit for damages sustained by the plaintiff in consequence of the Postal Department delivering an article without collecting the value if it was due from the addressee (the article being sent by V. P.) was not a suit which could be held to relate to an act done by the Postal officer concerned, in his official capacity. We must uphold the preliminary objection and dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Mandi Mathar Saheb ... ... (*Plaintiff*) *Appellant**

v.

Hossain Saheb and others ... (*Defendants*) *Respondents.*

Mathar Saheb v. Hossain Saheb.

Mahomedan Law—"Hiba"—Essentials—Delivery of possession—Formal departure and entry—Necessary—Fatwas—Precepts and texts.

There should be complete delivery of *seisin* for a *hiba* to be valid under the Mahomedan Law; but the Mahomedan law does not contemplate any particular mode of delivery of possession.

The question whether there has been a complete delivery or not in a particular case is a question of fact, to be determined with regard to the intention and contract of the parties and the nature of the property concerned in each case. It is not necessary in every case that the donor should formally depart from the premises which is the subject of a gift and that there should be a formal entry on the part of the donee.

Observations in Bailee's Digest 2nd Ed. p. 522 commented on.

Value of *Fatwas* discussed.

Distinction between the authority of Fatwas and that of Texts of the Koran or precepts of the Prophet pointed out.

Second Appeal from the decree of the District Court of Coimbatore in Appeal Suit No. 71 of 1910 presented against the decree of the Court of the Subordinate Judge of Niligris, Ootacamund in Original suit No. 54 of 1909.

A. S. Cowdell for appellant

K. Narayana Rao for respondent.

The Court delivered the following

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*S. A. No. 2084 of 1910. 22nd August 1912.

1. (1889) I. L. R. 17 C. 290.
2. (1904) I. L. R. 28 M. 213.

Mathar Saheb v. Hossain Saheb.

Judgment:—The finding of both the Courts is that although by Ex. A the mother and the aunt of Syed Abdulla who sold the house in dispute to the plaintiff purported to make a *hiba* or simple gift of the property to the said Abdulla, yet in fact they never relinquished possession of it, but continued to live in it as before with their other children. The District Judge also finds that the continued residence of the donors in the house was not in the capacity of tenants at will of the donee. At the same time it is found that Syed Abdulla after the date of gift obtained pattas in his name and paid kists. The conclusion which the Lower Courts seem to arrive at, is that there was no transmutation of possession, and the District Judge in more than one place in his Judgment calls the transaction a paper gift. If this be the correct reading of the findings of the Lower Courts, there can be no doubt that the gift is invalid and the plaintiff's suit was rightly dismissed.

But it is urged that the Lower Appellate Court misapplied the Muhammadan Law relating to *hiba* in as much as it relies on the fact that the donors did not leave the house at the time of making the gift but on the other hand, continued to reside in it as showing that there was no change of possession. If I thought that the Lower Appellate Court had acted on the notion that as a matter of substantive law there must be a formal departure of the donor from the premises the subject of a gift and a formal entry on the part of the donee, I should be inclined to hold that such a view of the Mahammadan Law is wrong and to direct a re-hearing of the Appeal. But I do not read the Judgments under appeal in that light. What the District Judge meant to find was, that there was in fact no transmutation of possession at all and in coming to that conclusion he was entitled to take into consideration the fact that the donors never left the house but went on living there with their children till their death. He treated this fact as a piece of evidence showing that there was no change of possession and I think rightly so. It is therefore unnecessary to determine the question which has been discussed before us at some length whether the Muhammadan Law requires that there should be a formal departure of the donor from the land or house the subject of a *hiba* and a formal entry therein on the part of the donee. I may however observe that the question seems to be settled by a series of rulings of the different High Courts beginning with *Shiek Ibrahim* v. *Shiek Suleman and others*[1]. There *West* and *Nanabhai Haridas* JJ. laid down "as to the delivery of the house

1. (1884) I. L. R. 9 B. 146 at 150.

Mathar Saheb *v.* Hossain Saheb.

the principle is to be borne in mind that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession. He occupies certain part and this occupation becoming actual possession by the will of the parties extends to the whole which is in immediate connection with such part, where the possession is rightfully though not where it is wrongfully taken. An appropriate intention where two persons are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner whose intention to transfer has been unequivocally manifested." This principle has been accepted in the later decisions not only of the Bombay High Court (See *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan and others*[1] Jenkins C. J. and Batty J.) but in this High Court by Muthuswami Iyer and Wilkinson JJ. in *Sharifa Bibi* v. *Goolam Muhammed Dustagir Khan and others*[2] and by Subramania Aiyar and Miller JJ. in *Kandath Veetil Bava alias Avuthala* v. *Musalia Vutil Parakuti and others*[3], and by Stanley C. J. and Burkitt J. in the Allahabad High Court in *Humera Bibi* v. *Najam Un-nisa Bibi.*[4]

In *Bava Sahib and another* v. *Muhammad,*[5] no doubt Davies and Boddam JJ. in one paragraph of the Judgment observe that when a house, the subject of the gift continues to be occupied by the giver there is no complete gift, but by this they did not apparently intend to lay down a hard and fast rule. All that they meant was to illustrate the proposition which they had enunciated in the previous paragraph *viz.*, that the gift will be null and void when the donor continues to exercise any act of ownership over the property. What the Muhammadan Law insists upon is that there should be complete delivery of *seisin*: but whether there has been such delivery in a particular case or not is mainly a question of fact which must be determined having regard to the intention and conduct of the parties and the nature of the property concerned. For instance, if the donee is already in possession, of the subject matter of gift such as in the capacity of a trustee or bailee or lessee or pledgee, it is not necessary that the donee should first give up possession and the donor then re-deliver possession to him. In such cases the character of possession changes by a declaration of the gift and acceptance. Similarly where a father makes a gift to his infant son transmutation of possession takes place by virtue of the gift, that is to say, possession by the

1. (1905) I. L. R. 29 B. 468.
2. (1892) I. L. R. 16 M. 43.
3. (1907) I. L. R. 30. M. 305.
4. (1905) I. L. R. 28 A. 147.
6. (1896) I. L. R. 19 M. 343.

Mathar Sahet v. Hossain Saheb.

father as owner of the property ; the subject of the gift is changed into possession under the gift as guardian of the infant donee. That the Muhammadan Law does not require any particular mode of delivery of possession is further illustrated in the following cases. For example, if the donee is placed in a position to take possession of the thing given, that would in many cases be deemed sufficient as when a man makes a gift of a piece of cloth in an open box and makes over the box to the donee (See Baillie's Digest 2nd Edition page 522). Or if the property given is land, or a house in the occupation of ryots or tenants a request to them by the donor to attorn to the donee is sufficient delivery of *seisin.*

In Baillie (page 527) it is laid down that if a man should make a gift of a mansion in which there are some effects belonging to him and should deliver the mansion to the donee or deliver it with the effects, the gift would not be valid. The statement which is based on the authority of Kazu Khan's Fatwa is cited in some later collections of *Fatwas* or opinions of jurists and commentaries with disapproval. The principle which governs such cases is stated to be (see Baillie page 528) that the thing given being occupied with the property of the donor prevents the taking of possession which is necessary to the completion of the gift. But it is also mentioned that if a deposit be first made of the effects with the donee the donor vacating them for him and then making delivery of the mansion the gift would be valid. The inference I draw is that the gift of a house in which there are goods of the donor is invalid if the continued occupation of the house with the goods be as of right and not by the license of the donee. As regards the form in which the above proposition is stated in Baillie's Digest from Fatwa Quidithan the facts must be borne in mind that most of the Fatwas or opinions of jurists were delivered in answers to abstract questions intended to illustrate a certain principle of law and it would be entirely misleading to treat such opinions as absolute rules of law having the same authority as a text of the Koran or an universally accepted ruling of the prophet or a proposition established by Ijma or consensus of opinion of jurists. They are mere deductions of jurists or applications of certain well established rules in particular cases actual or suppositionary and until they are shown to have been accepted by consensus of opinion cannot be regarded as of binding authority. The distinction between deduction of a jurist in matters which fall within the province of *Ijlihad* or juristic (opinion *mujtahid fil*) and rules based on *nuss* or authority of a text of a Koran or a well known precept of the Prophet or sanctioned by Ijma or consensus of opinion is a principle feature of the Muhammadan legal system and cannot safely be ignored.

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If therefore the dictum cited in Baillie's Digest be read as a mere illustration of the rule that complete possession must be given in order to make a gift valid, the principle enunciated in *Shiek Ibrahim* v. *Sheik Suleman and others*,[1] would seem to me in accordance with Muhammadan Law. But the finding in this case being as I have stated, that there was no complete change of possession, the second appeal must be dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[From the Court of the Judicial Commissioner of Oudh.]

Present:—Lord Macnaghten, Lord Shaw, Lord Mersey, Lord Robson and Mr. Ameer Ali.

Champat Singh and others ... ... *Appellants.**

v.

Jangu Singh and another ... ... *Respondents.*

Mortgagor and Mortgagee—Accounts—Deposit in Court—Forfeiture—Lapse to Government.

Champat Singh *v.* Jangu Singh.

Held: that in a matter of accounts between a mortgagor and his mortgagees, the mortgagees must give credit for an amount deposited in court by the mortgagor to the mortgagees' credit in the case pending an appeal to the Privy Council by the mortgagees on the ground that the mortgagee ought to have taken it out of court without prejudice to their pending appeal either by arrangement or with the sanction of the Court in India or the sanction of the Judicial Committee, which would have been given as a matter of course, even though the amount itself had been forfeited to Government by lapse of time.

De. Gruyther, K. C. and *Dube* for appellants.

K. Brown for respondents.

Their Lordships' judgment was delivered by :—

Lord Macnaghten:—This was an appeal from an order of the Judicial Commissioners dismissing an application by the appellants, as mortgagors, for the execution of a redemption decree. The mortgage in respect of which the decree was made was a usufructuary mortgage for a period which has expired, but there was a provision for payment on redemption of a sum in respect of interest. The mode of calculating interest was a matter in controversy in the redemption proceedings in regard to which this Board differed from the view of the Judicial Commissioners.

By the judgment of this Board, dated the 28th of July 1906, the respondents, the mortgagees, were held entitled to simple interest

1. (1884) I. L. R. 9 B. at 150.

at the rate of 24 per cent. per annum on Rs.3,519, the original mortgage debt as from the 14th of January 1867, the date of the mortgage as well as to mesne profits until redemption.

In 1902, previously to the judgment of this Board of the 28th of July 1906, the mortgagors had deposited in Court Rs. 3,844, a portion of which they afterwards withdrew, leaving in Court Rs. 3,335, a sum sufficient to satisfy the interest payable in respect of the mortgage according to the judgment of the Subordinate Judge of Sitapur affirmed in substance by the Judicial Commissioner in April 1902, and on the 5th of December, 1902 the mortgagors were let into possession of the mortgaged premises, although an appeal to His Majesty against the order of the Judicial Commissioner was then pending.

After the judgment of this Board possession of the mortgaged premises was restored to the mortgagees, on the 12th of November 1906.

On the 15th of December 1906 the mortgagors deposited in Court Rs. 40,000 and again applied for possession of the mortgaged premises.

The sum of Rs. 40,000 *plus* the sum of Rs. 3,335, making together the sum of Rs. 43,335, was more than sufficient to discharge the interest due in respect of the mortgage in accordance with the judgment of the 28th of July 1906, amounting on the 15th of December 1906, to Rs. 37,239-2-11, together with the amount due to the mortgagees for costs which amounted to Rs.3,765, making together the sum of Rs. 41,004-2-11.

On the opening of the present appeal it became obvious that the refusal of the Judicial Commissioners to restore the mortgagors to possession was due to a misconception of the effect of their Lordships' judgment of the 28th of July 1906, or to a slip in the order founded on that judgment. The error, if there was a slip in the order is attributable to the mortgagees as their appeal was heard *ex-parte*. Their Lordships therefore intimated that they would humbly advise His Majesty that the present appeal should be allowed, and minutes were to be settled by the Counsel for the parties. The learned counsel, however, were unable to agree, and the matter has been referred to their Lordships.

It is stated that the sum of Rs. 3,335 has now lapsed to the government under the rules.

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It appears that after having been restored to possession the mortgagees obtained a decree against the mortgagors for the sum of Rs. 9,800, which was the agreed amount of the mesne profits received by the mortgagors during the period of their possession.

On behalf of the mortgagors Mr. De. Gruyther offered to set this amount Rs. 9,800, against the amount of mesne profits received by the mortgagees since the deposit in court of the sum of Rs. 40,000 by the mortgagors. Their Lordships think that this is a fair and reasonable proposal and that effect ought to be given to it.

Their Lordships also think that if the sum of Rs. 3,935 has lapsed to the Government, and is not forthcoming, the mortgagee must give credit for that amount as they ought to have taken it out of Court without prejudice to their pending appeal either by arrangement or with the sanction of the Court in India or the sanction of this Board which no doubt would have been given as a matter of course.

Thier Lordships think that the proper order, therefore, will be that the mortgagors should be restored to possession forthwith and that the mesne profits received by the mortgagors since the 15th December 1906 should be set off against the decree for Rs. 9,800 and taken in satisfaction of that decree and interest, and (the mortgagees being entitled to draw out of Court Rs. 41,004-2-11 the amount due to them for interest and costs calculated up to the 15th of December 1906), the balance of the amount in Court increased by the addition of the sum of Rs. 3,935, if that sum has lapsed to the Government, should be paid out to the mortgagors.

Their Lordships will humbly advise His Majesty accordingly Their Lordships will make no order as to costs.

Appeal allowed

Barrow, Rogers and *Nevill.* Solicitors for appellants.

T. L. Wilson & Co. Solicitors for respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[From the Court of the Judicial Commissioner of Oudh.]

Present:—Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Chaudhri Mohammad Mehdi Hasan Khan. *Defendant—Appellant**

v.

Sri Mandir Das ... ... *Plaintiff—Respondent*

and

Sri Mandir Das ... ... *Plaintiff—Appellant*

v.

Chundhri Mohammad Mehdi Hasan Khan. *Defendant—Respondent*

Choudhri Medhi Hasan *v.* Sri Mandi Das.

Evidence Act S. 114—Presumption—Plea of discharge—Bond with defendant—Suspicion—Question of onus after parties go into evidence.

In a suit on a bond the production by the defendant of the bond with the endorsement of payments casts on the plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding *i.e.* of showing that the bond came in defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or un-authorised.

Suspicion though a ground for scrutiny cannot be made the foundation of a decision.

Quære: Whether any question of onus remains after the parties go into evidence.

G. E. A. Ross for the appellant.

Their Lordships' Judgment was delivered by:—

Mr. Ameer Ali:—These are two consolidated Appeals from a Judgment and Decree of the Judicial Commissioner of Oudh dated the 31st of July 1907, and arise out of a suit brought by the Plaintiff in the Court of the Subordinate Judge of Barabanki on the basis of a mortgage bond executed by the Defendant Chowdhri Mehdi Hassan on the 22nd of December 1898, in favour of one Sukh Dei since deceased. It Appears that Sukh Dei carried on in her life time a money-lending business, and that the Plaintiff has obtained a succession certificate under Act VII of 1889 to collect the debts due to her estate. The present action was launched on the 16th of February, 1906 for the recovery of over Rs. 62,000, principal and interest, by the sale of the mortgaged premises. At the time of the institution of the suit the plaintiff produced only a copy of the document, alleging that the original had been lost. The Defendant in his answer admitted its execution but alleged that the debt was

* 18th June 1912.

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discharged. In support of his allegation he produced the original document containing the endorsement of payment by Sukh Dei and her general agent Bansidhar.

In view of the presumption embodied in Section 114 of the Indian Evidence Act I of 1872 the Subordinate Judge was of opinion that the burden of establishing that the obligation created by the bond was still outstanding lay on the plaintiff. Their Lordships consider this to be the real meaning of the issue framed by him on the 6th of September 1906 after argument. The plaintiff accepted the *onus* and obtained an adjournment for the production of evidence in rebuttal of the presumption arising from the possession of the document by the defendant. The hearing of the case was resumed in January 1907, and the plaintiff examined a number of witnesses to prove that the defendant had dishonestly obtained possession of the bond after Sukh Dei's death through the instrumentality of Bansidhar. He also attempted to establish that Sukh Dei was not at Barabanki on the date of the alleged payment. The Defendant then went into evidence regarding the fact of payment and the delivery of the document to his servants on his behalf. The Subordinate Judge disbelieved the Plaintiff's witnesses. With regard to the Defendant's evidence, he observed as follows :—

"I would have hesitated in believing the testimony of Defendant's witnesses "also, had it not been corroborated by the facts that the bond bearing an end-"orsement of payment was filed from the Defendant's custody, and it was stated "by Plaintiff's own witnesses that the said endorsement was in the hand-writing "of Sukh Dei's general agent Bansidhar."

In the result the Subordinate Judge dismissed the suit with costs.

From the Decree the Plaintiff appealed to the Court of the Judicial Commissioner of Oudh. The Learned Judges who heard the Appeal were of opinion that at the trial the *onus* had been wrongly thrown on the Plaintiff. In this view the learned judge who delivered the principal judgment proceeded to examine in the first instance the evidence produced by the Defendant and came to the conclusion that it was not reliable. He then considered the testimony of the Plaintiff's witnesses and was of opinion that it was false. As regards the fact that the document on which the suit was based was in the possession of the Defendant, and produced by him with the admitted endorsement of Sukh Dei's General Agent, he held that it must have come into the Defendant's hands by some dishonest means. He accordingly reversed the decision of the First Court and decreed the Plaintiff's claim; and his learned colleague concurred in this Judgment. The Defendant has appealed to His Majesty in Council

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and there is a Cross Appeal by the Plaintiff on the question of interest disallowed by the learned judges in the court below. But he has not appeared either in support of the judgment in his favour or to argue his own Appeal.

Their Lordships after a careful consideration of the case have come to the conclusion that the Judgment and Decree of the Judicial Commissioner cannot be sustained.

Assuming that the question of *onus* remained after the parties had gone into evidence, and that it lay on the Defendant to establish the allegation of payment, he appears to have proved facts which strongly support the presumption of law arising from the possession of the bond.

He shewed that the endorsement of payment on the document was in the hand-writing of Bansidhar, who, it is admitted, was the "recognised" and general agent of Sukh Dei and held a power of attorney from her, and that it bore his signature. The Defendant also produced a letter of demand on behalf of Sukh Dei, dated some seventeen days before the date of the alleged payment, signed by Bansidhar. He proved further that this Bansidhar used to give acquittances on Sukh Dei's behalf. Matadin, who, according to the Plaintiff's own witnesses, is the Defendant's treasurer, states that he and two other fellow servants carried the money to Sukh Dei's house and that she after payment signed the document in Hindi in his presence below the endorsement written by Bansidhar and returned it to him. There is not a trace of cross-examination in the evidence of this witness with regard to genuineness of Sukh Dei's signature. That statement remains uncontradicted, for no attempt so far as their Lordships can see, was made to recall the Plaintiff's witnesses to say the alleged signature of Sukh Dei was not in her hand.

To meet the case made by the Defendant, the Plaintiff produced three classes of testimony. He attempted to show that the Defendant was heavily involved in debt at or about the time of the alleged payment, and he wished the Court to draw from this circumstance the inference that re-payment was unlikely. The trial Judge very properly, in their Lordships' opinion, observed that the fact of the Defendant's indebtedness in itself would not go to prove that he did not repay the debt in question." And he referred to the evidence of one of the Plaintiff's witnesses to show that the Defendant was in funds in June 1902 and repaid other debts.

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The real and substantial case put forward by the Plaintiff was of a two fold charater—first, that the bond was dishonestly and fraudulently made over to the Defendant by Bansidhar after Sukh Dei's death; and secondly, that Sukh Dei was not at Barabanki on the date of the alleged payment. It is to be remarked that although a book was produced by a Pujari, whom the Subordinate Judge calls "a tutored and untruthful witness" to prove Sukh Dei's absence from Barabanki, no attempt was made by the plaintiff to produce her *mahajani* books of account regularly kept in the course of business.

The Subordinate Judge disbelieved the story told by the Plaintiff's witnesses and the Appellate Court agreed with him in holding that their testimony was worthless. But it has built up a theory of its own, based chiefly on surmises, regarding the manner in which the bond came into the possessisn of the Defendant. The gist of the Appellate Court's judgment is to be found in the following statements, which also show how the learned Judges have looked at the case. Referring to the testimony of the Plaintiff's witnesses, they say:—

"Worthless as this evidence is, it does not in any way make the Defendant "Respondent's case more probable. In the view that I have taken of the "evidence of payment it is difficult to account for the possession of the bond "on the part of the Defendant; yet there are documents on the record whence "it may be inferred that some person for his own ends laid his hands on the "document soon after the death of Musammat Sukhder and that through him it "came into possession of the Defendant."

And after referring to the disputes among Sukh Dei's relations after her death, they go on to say.—

"The Plaintiff's inability to account for its disappearance no doubt sug-"gested to him the reprehensible course of procuring false evidence, but when "the question is considered whether the possession of the endorsed bond on the "part of the defendant raises a presumption of payment due weight should be "attached to the possibility during this state of confusion of some person "purloining the bond or even of its being lost and afterwards found and coming "into the defendant's possession."

Their Lordships cannot help considering this mode of treating a case where two distinct and conflicting sects of facts are opposed to each other as unsatisfactory. The plaintiff came into court with a definite story to account for the possession of the document by the defendant. The learned judges agree with the First Court in holding that story to be false, and yet they proceed to build up a case for the plaintiff

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on what they call a "possibility." As already observed, the defendant did not rest his case merely on the legal presumption which arose from the possession of the document; he produced positive testimony which received corroboration from that presumption, and he proved facts which made his statement probable. The learned judges having disbelieved the evidence on both sides, have set aside the presumption under Section 114 of the Evidence Act, which only embodies the ordinary rule of law, by a possibility based on surmises. Now it is a settled principle that suspicion, though a ground for scrutiny cannot be made the foundation of a decision and that is exactly what appears to have happened in this case.

With reference to the conflicting views of the two Courts in India regarding the question of *onus*, in view of the presumption under section 114 of the Indian Evidence Act their Lordships are of opinion that the Subordinate Judge was right in holding that the production by the defendant of the bond with the endorsement of of payment cast on the plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding,in other words, of showing that the bond came in Defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or unauthorised.

On the whole their Lordships are of opinion that the Judgment and Decree appealed against should be set aside and the Plaintiff's suit dismissed with costs in all the Courts. And they will humbly advise His Majesty accordingly. The Plaintiff will pay the costs of these Appeals.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

The Secretary of State for India in Council represented by the Collector of Kistna ... *Appellant.**

v.

Penumacha Venkatapatha Raju and another ... *Respondents.*

Jurisdiction of Civil Courts—Suit for refund of land revenue—Crown's prerogative—Land revenue, nature of—

A Suit for refund of land revenue on the ground of Government's failure to supply water is not maintainable by Civil Courts.

Secretary of State for India *v.* Venkatapatha Raju.

Land Revenue is a tax imposed on lands by virtue of the prerogative of the State; and civil courts have no jurisdiction to try any question relating to it. The liability to pay land revenue does not rest on contract or on any relation resembling contract.

Second appeal from the decree of the Court of the Subordinate Judge of Kistna at Ellore in A. S. No. 45 of 1910 presented against the decree of the Court of the Additional District Munsif of Tanuku in O. S. No. 304 of 1908.

The Government Pleader for appellant.

P. Narayana Murti for respondents.

The Court delivered the following.

Judgment.—The decrees of the Lower Courts are altogether unsupportable. The land is admittedly classed as wet land, and no cess was levied from the plaintiffs under Act VII of 1865. The suit is therefore one for refund of land revenue on the ground that as the Government failed to supply water for raising wet crops, it was not entitled to levy the revenue assessed on the land. It is entirely a matter for Government to decide what amount of revenue should be levied on any land and Civil Courts have no jurisdiction to try any question relating to it. (S. 58 of the Madras Revenue Recovery Act, II of 1864). The Lower Courts are quite wrong in supposing that the liability to pay land revenue rests on contract or some relation resembling contract. Land revenue is a tax imposed on lands by virtue of the prerogative of the State. The plaintiffs were bound to pay it whether water was available or not for wet cultivation. If they regarded the tax as excessive, their proper and only remedy was to appeal to Government for the reduction of the tax. The decrees of the Lower Courts are reversed and the suit is dismissed with costs throughout.

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*S. A. No. 644 of 1911. 28th November 1912.

NOTES OF RECENT CASES.

Chief Justice
Sankaran Nair J.
1912, *July*

C. C. C. A. 31 of 1910.

C. P. C. S. 73, Cl (2). Rateable distribution—S. 42 Specific Relief Act.

A suit will not lie for a declaration that the plaintiff is entitled to rateable distribution of assets before they are distributed to the defendant's decree-holders. The policy of S. 73 cl. (2) C. P. C. must be carried out.

Parasurama Pattar v. *Viraragava Pattar*[1] followed.

T. V. Seshagiri Aiyar for appellant.

Ramanatha Shenai for respondent.

Offg. C. J.
Napier J.
1912, *July* 16.

C. M. A. 146 of 1911.

Order 21, S. 95—Obstruction—Application to remove, out of time, dismissed—Subsequent application for execution, maintainability.

An application for execution by recovery of possession is maintainable even if no previous application had been made against an obstruction or if one is made and dismissed as being out of time.

Muthia v. *Appasami*[2] followed.

S. Varadachari for appellant.

S. Muthia Mudaliar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *July* 18.

S. A. 2157 of 1910.

C. P. C. S. 424.—Actions for injunction —Notice to Government.

Even in actions for injunction, Government, is entitled to the 2 months' notice prescribed by Sec. 424 C. P. C.

Government Pleader for appellant.

A. Krishnasasamy Aiyar for respondent.

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1. (1897) 7 M. L. J. 277.

2. (1910) I. L. R. 13 M. 504.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *July* 16.

S. A. 1702 of 1910.

Hindu Law—Sale for consideration binding in part—Member seeking to recover share must pay his share of the consideration.

A member of a Hindu family seeking to recover his share of the property sold by the manager can recover it only on paying his share of the consideration found binding.

T. V. Seshagiri Aiyar for appellant.

T. Natesa Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *July* 19.

S. A. 430 of 1910.

Malabar Law—Kanomdar—Enhanced revenue, liability for—Construction of the covenant to pay revenue.

Where a kanomdar undertook to pay the revenue without any indication that it is to be revenue as existing at the date of the document, their Lordships held that there was no reason to restrict it to the revenue as then existing but that having regard to the fact that the Kanom Pattam is generally fixed lower than the Verum Pattam, the more equitable construction and the construction that is presumably more in accordance with the intentions of the parties was that the Kanomdar was intended to be liabe for the enhanced revenue.

A. Nilakanta Aiyar for appellant.

T. R. Ramachandra Aiyar for respondent.

NOTES OF RECENT CASES.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *July* 22.

S. A. 2053 of 1910.

Limitation Act, Article 95—Applicability of, to judgment obtained by perjured evidence.

Without deciding whether procuring judgment by perjured evidence is a ground for setting aside a judgment otherwise properly rendered between parties, their Lordships held that a party is not entitled to re-agitate a claim (here it was a second suit for redemption) without setting aside the previous judgment against him disallowing the same claim within 3 years under Article 95 of the Limitation Act.

K. R. Subrahmania Sastry for appellant.

K. Jagannatha Aiyar for respondent.

Miller J.
Abdur Rahim J.
1912, *July* 23.

A. S. 53 of 1907.

Landlord and Tenant—Lease so long as the tenant likes—Tenancy at will.

A lease under which the tenant is to hold as long as he pleases, is a tenancy at will and determinable at the option of either party to the transaction.

T. Rangachariar for appellant.

C. V. Ananthakrishna Aiyar for respondent.

Miller J.
Sadasiva Aiyar J.
1912, *July* 24.

S. A. 360 of 1911.

Hindu Law—Daughter's estate—Alienation for maintenance.

It is not incompetent for the daughter of a deceased Hindu to alienate the estate inherited from her father for the purpose of maintaining herself when she is in indigent circumstances.

P. Narayanamurthi for appellant.

B. Narasimha Rao for respondent.

Offg. Ch. J.
Napier J.
1912, *July* 25.

S. A. 2072 of 1911.

Limitation—Mortgage before and after 1882, no difference between.

For the purpose of limitation there is no difference between hypothecations before 1882 and those after.

V. C. Seshachariar for appellant.

V. Purushottam Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *July* 26.

S. A. 721 of 1911.

Provincial Small Cause Courts Act—Suit for value of trees wrongfully cut.

A suit for the value of timber-trees wrongfully cut by the defendant who claimed the right thereto as Dasabandham Inamdar is cognizable by the Court of Small Causes. The fact that the defendant sets up a title does not oust the Small Cause Court's jurisdiction.

T. V. Muthukrishna Aiyar for appellant.

S. Srinivasa Aiyar for respondent.

NOTES OF RECENT CASES.

Miller J.
Abdur Rahim J.
1912, *July* 30.

A. S. 95 of 1908.

Guardian and Ward recently come of age.—Undue influence—Burden of proof.—Sale negotiated by guardian, not advantageous to either.

There is no warrant for applying the rule that a guardian dealing with a ward recently come of age ought to show that he has exercised no undue influence on the ward to a purchaser from the ward from the mere fact that the transaction was brought about by the guardian and was not as beneficial to the ward as it could have been when no advantage was secured to the guardian himself by the transaction.

C. V. Anantakrishna Aiyar for appellant.

S. Srinivasa Aiyangar for respondent.

Miller J.
Abdur Rahim J.
1912, *July* 31.

A. S. 159 and 160 of 1908.

Principal and agent—Liabilty to account—Principal's failure to substantiate charge of misappropriation—Quantum of proof.

An agent is bound to account for all moneys received by him on account of his agency. The fact that the principal is not able to substantiate the charge of misappropriation in respect of certain items does not exonerate the agent from this liability. He would be bound to show how he has disbursed the amounts received by him on behalf of the principal. The *quantum* of proof required to prove due accounting may vary according to circumstances *e. g.* delay on the principal's part.

K. Srinivasa Aiyangar and R. Rangasamy Aiyangar for appellant.

S. Srinivasa Aiyanger and C. V. Anantakrishna Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *July* 31.

S. A. 1723 of 1910.

Limitation Act Article 144—*Trustee—Permanent Lease—Limitation commences to run immediately.*

Where a trustee alienates trust property by way of permanent lease, limitation under Article 144, Limitation Act commences to run against the trust immediately on such alienation and by 12 years' possession the alienee acquires a permanent lessee's interest. The decision of the Privy Council in *Abhiram Goswamis'*[1] case ought to be restricted to case where the trustee has a beneficial interest in the estate.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

Offg. C. J.
Ayling J.
1912, *July* 31.

S. A. 2102 of 1910.

S. 7, Limitation Act 1877, *Received—guardian not discharged—Incompetency of another guardian to act.*

S. 7 of the Limitation Act (1877) applies to all judicial proceedings including review. If there is a guardian appointed for certain minors in a case, then no other guardian is competent to act for them unless the previous one is discharged, or dead or incompetent to act for any valid reason such as collusion, etc.

T. M. Krishnaswami Aiyar for appellant.

T. R. Krishnaswami Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 1.

S. A. 523 of 1911.

Probate and Administration Act—S. 4 and S. 90—Powers of executor who has not taken act probate.

Property vests in an executor of a Hindu will in the mofussil notwithstanding that he has not taken out probate and in the absence of evidence that the vendee knew that the debts of the testator had all been discharged and there was no need for the sale, a purchaser from such executor is protected.

T. M. Krishnaswami Aiyar for appellant.

L. A. Govindaraghava Aiyar for respondent.

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1. (1909) I. L. R. 36 C. 1003.

NOTES OF RECENT CASES.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 7.

S. A. 112 to 115 of 1911.

Limitation Act, Art. 131, 144—Payment in money for 12 years after dispute—Landlords' right barred.

Per Sadasiva Aiyar J.—When the landlord asserts that the rent due to him is in kind but the tenant says it is in money and makes payment for more than twelve years on that basis, the landlords right to claim payment in kind would be barred either under Article 131 or Article 144.

Per Sundara Aiyar J.—When payment is being made for a number of years in money even after dispute it is in itself evidence of the nature of landlords' right thereto and equivocal evidence that at some long anterior date payment was in kind will not give the right to the landlord to revert to the status *quo ante.*

S. Srinivasa Aiyangar for appellant.

C. S. Venkatachariar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August.* 7.

S. A. 2090 of 1910.

Partition—Undertaking by shareholder to pay the Revenue due on the share of the other—Charge.

When to equalise partition, one of the shareholders is asked to pay money to the other (in this to pay the assessment due upon the other's share) such payment is a charge in law upon the share of the shareholder who is bound to make the payment.

K. Ramanatha Shenai for appellant.

B. Sitarama Row for respondent.

Benson J.
Napier J.
1912, *August* 13.

C. M. A. 79 of 1911.

Remand—Order 41, r. 23—Contrary to law when not justified.

A remand which is not justified by Order 41, r. 23 or some other provision of the code cannot be supported.

S. Swaminathan for appellant.

K. P. Govinda Menon for respondent.

Wallis J.
Sankaran Nair J.
1912, *August* 14.

S. A. 128 of 1909.

C. P. C., Cl. 539—Taluk Board, is only one person.

The Taluk Board as such cannot in law be taken to amount to two or more persons as required by Sec. 539, C. P. C. because it consists of more than 2 Hindu members competent to sue.

K. Srinivasa Aiyangar for appellant.

L. A. Govindaraghava Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 15.

S. A. 267 of 1911.

Registration Act—Payment of money before Registering Officer—Record of—Prima facie evidence.

The object of the Registration Act providing for the recording of payment of consideration before a Registration Officer is to secure solemn evidence of payment, and it lies on the party alleging the contrary to prove that it was not a real but only a feigned payment.

V. Ramesam for appellant.

P. Narayanamurthi for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 15.

S. A. 1469 of 1911.

Hindu Law—Widow's alienation—Reversioner's suit to set aside—Income of estate—Liability of widow to pay interest on debts out of income.

A widow is not bound to discharge her husband's debt out of the income of the estate; but she is not entitled to allow the debt to accumulate by non-payment of interest which she is bound to pay out of her income as a legitimate expense. But if there was actual pressure at the time of the alienation or if the alienee believes in the existence of necessity after *bona fide* enquiry he will be protected.

P. Narayanamurthi for appellant.

V. Ramesam for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J. } S. A. 203 of 1910.
1912, *August* 16.

C. P. C., Or. 41 R. 31--Judgment of Appellate Court, what it should contain.

A judgment of an Appellate Court which dismissed the appeal simply stating that the court of first instance had given reasons for its findings is not one in accordance with law especially when some of the reasons given by the first court are not altogether correct.

C. S. Venkatachari for appellant.

C. V. Anantakrishna Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J. } S. A. 1029 of 1911.
1912, *August* 16.

S. 134, Cl. 2, Estates Land Act—Right of unregistered proprietor to distrain for fasli previous to Act—Vested right of distraint not taken away by Act S. 8 of Madras Act II. of 1891 (General Clauses Act.)

A vested right to distrain for a Fasli before the Estates Land Act came into force is not taken away by that Act. It is a right secondary or subsidiary to the right to rent.

T. R. Venkatarama Sastri for appellant.

S. Srinivasa Aiyangar, A. Sundaram and *C. Narasimhachari* for respondents.

Sundara Aiyar J.
Sadasiva Aiyar J. } S. A. 287 of 1911.
1912 August 16.

Wells—Joint property in—Evidence Act S. 13—Deed executed by one of the parties dealing with property—Probative force of.

Held: There can be a joint ownership in a well situate in land belonging to one of the owners only.

Deeds evidencing transactions of one of the parties to the suit in respect of the suit property are admissible in evidence against the other party to the suit even though the latter was no party to the transactions and some times the only evidence available in the case.

S. Srinivasa Aiyar for appellant.

T. Rangaramanuja Chariar for respondent.

Chief Justice
Napier J.
1912, *August* 20.

C. M. P. A. 46 of 1911.

Act 180, Limitation Act—Application for possession of properties purchased in execution.

An application made after the New Limitation Act for possession of properties purchased in execution of a decree, which purchase was confirmed and made absolute more than three years before the date of the application is governed by Art. 180 of the New Limitation Act.

C. Padmanabha Aiyangar for appellant.

K. Jagannadha Aiyer for respondent.

Offg. Chief. J.
Napier J.
1912, *August* 21.

Cr. R. C. No. 169 of 1912.

Bail—Liability to forfeiture for suicide of the principal.

The bond of a surety who stands bail is not liable to be forfeited for the suicide of the person for whose appearance he stood bail.

Dr. Swaminathan for petitioner.

Crown Prosecutor-Contra.

Miller J.
Abdur Rahim J.
1912, *August* 19

A. S. No. 80 of 1908.

Limitation—Malicious prosecution—Terminus a quo—Date of oral judgment or written judgment.

When the Magistrate in the Criminal case in which the plaintiff was maliciously prosecuted orally discharged the accused (plaintiff) but wrote out a judgment and delivered the same in Court on some time later limitation for the suit for damages for the malicious prosecution runs from the latter date and not from the former.

L. A. Govindaraghava Aiyar and T. K. Govinda Aiyar for appellant.

T. R. Ramchandra Aiyar and C. V. Anantakrishna Aiyar for respondents.

NOTES OF RECENT CASES.

Sankaran Nair. J.
1912, *August* 19.
C. R. P. 253 of 1911.

C. P. C., Sec. 115—Part of claim bad; no ground for rejection of application for leave to sue in forma pauperis.

The Court is not entitled to reject an application for leave to sue in forma pauperis on the ground that a part of the claim is unsustainable and the valid portion of the claim can be prosecuted in a Court of inferior jurisdiction. The High Court can correct the error of the lower court under Sec. 115 C. P. C.

B. Sitarama Rao for C. V. Anantakrishna Aiyar for Petitioner.

K. Ramanatha Shenai, Ryru Numbiar and K. Govinda Marar for Respondents.

Full Bench.
Wallis J.
Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 30.
C. R. P. No. 744 of 1911.

C. P. C., S. 115—Jurisdiction—High Court—Power of interference.

The plaint in a suit in ejectment was returned by the Munsif on the ground that the suit lay in a Revenue Court under the Estates Land Act. The Subordinate Judge on appeal reversed the order of the Munsif and remanded the suit for trial on the merits. On revision under S. 115 C. P. C., the following question was referred to a Full Bench. "Has the High Court jurisdiction to interfere under S. 115 where an Appellate Court erroneously decided in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of First Instance was or was not competent (had or had not jurisdiction) to entertain the suit?"

Held per *Wallis*, and *Sundara Aiyar*, JJ.—The High Court has jurisdiction. The Appellate Court in directing the Court of First Instance to try a suit which it is not competent to try itself exercises jurisdiction over the cause and will thus be exercising jurisdiction not vested in it by law within the meaning of Cl. (1) of S. 115

C. P. C. It will also be acting illegally in the exercise of its jurisdiction under Cl. 3. *Amir Hussan Khan* v. *Sheo Baksh Singh* [1] distinguished. *Mathuranath Sarkar* v. *Umesh Chandra Sarkar* [2] dissented from.

Per *Sadasiva Aiyar* J.—The Appellate Court had jurisdiction to decide whether the Court of First Instance had or had not jurisdiction and if in the exercise of that jurisdiction it decides that question wrongly it will only be committing an error of law and does not act without jurisdiction or illegally in the exercise of its jurisdiction. *Amir Hussan Khan* v. *Sheo Baksh Singh* [1] followed. *Mathuranath Sarkar* v. *Umesh Chandra Sarkar* [2] followed.

V. Ram Doss for petitioner.

T. Prakasam and *P. Narayana Murthi* for respondents.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 30.

S. A. No. 949 of 1911.

Mortage of a pro-note—No assignment—Right to sue thereon—Damages.

In this case the mortgagor deposited as security two promissory notes with the mortgagee in addition to the lands mortgaged. Owing to default of the mortgagee in bringing in the suit on the pro-note in time the debt under the pro-note became barred. The question was whether the mortgagor was entitled to debit the amount of the pro-note to the account of the mortgagee.

Sundara Aiyar J.—A mortgage of a debt or chose in action without assignment of the same does not vest the property in the debt in the hypothecatee to enable him to sue on the bond and he is not bound to sue on the bond the person liable thereunder.

Sadasiva Aiyar J.—Where the instrument is put in possession of the mortgagee as security, his position is similar to that of a trustee to the mortgagor.

The mortgagee is bailee and due diligence should be exercised by him in collecting the amount due under the bond.

C. V. Ananthakrishna Aiyar for appellant.

K. N. Aiya for respondent.

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1 (1884) I. L. R. 11 Cal. p. 6 (P. C.)   2. (1896) 1 C. W. N. p. 626.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 30.

S. A. No. 355 of 1911.

Hindu Law—Suit for partition—Minor—Provision for marriage expenses out of ancestral estate—Widow's maintenance—Charge.

In a suit for partition a (minor) co-parcener is entitled to have provision made for the expenses of his Upanayanam out of the father's ancestral estate. A widowed mother is entitled to have her maintenance as a charge not only on the property that has fallen to the share of her own sons but also on that of her stepsons. In a suit by a co-parcener who has not been excluded from the family the manager is not liable to account for mesne profits.

Per *Sundara Aiyar* J. In a decree for partition a coparcener is entitled to have a provision made for the expenses of his marriage out of the ancestral estate.

Per *Sadasiva Aiyar* J. Marriage not being a necessary samskara, though the expenses for the marriage of a co-parcener after they have been incurred would be proper expenditure to be met out of the joint family funds, there should be no separate provision for the marriage expenses especially in a case like the present where the co-parcener is a minor five years old who according to sastras is not entitled to marry before his 24th year.

T. Natesa Aiyar and *P. R. Ganapathi Aiyar* for appellant.

C. V. Anantakrishna Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 30.

S. A. No. 103 of 1911.

Agent—liability—pro-note.

Per *Sundara Aiyar* J.—If it appears anywhere in the body of a promissory note that the executant thereof executed it as an agent he should not be held personally liable thereunder. The question whether the executant of the pronote is not to incur personal liability is one depending on the construction of the pro-note. The construction of instruments in this country should not be based on the construction of similar instruments in England. In construing documents in this country the habits of the people of this country should be taken into consideration.

Per *Sadasiva Aiyar* J.—Unless the executant signs the instrument describing himself as agent he is personally liable under this pro-note.

S. Gopalaswami Aiyangar for appellant.
B. Sitaram Rao for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 30.

Crl. Rev. Case No. 509 of 1911.

Certiorari—High Court—Power to issue—Extent of.

Sundara Aiyar J. The High Court has no power to issue a writ of *certiorari* to any one outside the limits of its ordinary original jurisdiction.

The High Court has no power to quash a commitment by a Sub-Divisional Magistrate in the mofussil by issuing a writ of *certiorari*. A Sub-Divisional Magistrate hearing an income-tax appeal is a court. The Board of Revenue has no power to revise an order of a Revenue Court under S. 476 Criminal Procedure Code. An order under S. 476 ordering commitment if not passed at the same time as the order disposing of the income tax appeal cannot be said to be one passed without jurisdiction though it may not be legal.

Sadasiva Aiyar J. The High Court has power to issue a writ of *certiorari* to judicial bodies in the mofussil.

S. Swaminathan for petitioner.

Public Prosecutor—(L. A. Govindaraghava Iyer.)

NOTES OF RECENT CASES.

Sankaran Nair J.
1912, *August* 19.

C. R. P. 38 of 1911.

Parties—Non-joinder of co-trustee in revision petition.

Where an archaka of a temple sued the three trustees of a Hindu temple for the refund of a fine illegally levied from him, and the District Munsif decreed that the fine ought to be refunded out of the Devastanam funds.

Held, that a Civil Revision Petition preferred against it by two of the trustees alone without bringing the other on the record at all, is not competent and is unsustainable.

T. Rangachariar for petitioner.

C. Padmanabha Aiyangar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 26.

S. A. No. 507 of 1911.

Hindu Law—Widow—Relinquishment by reversioner—Alienation—Estoppel.

Where a reversioner suing to set aside an adoption agreed after setting aside the adoption to relinquish the whole estate to the widow on receipt of a consideration enabling her to alienate it in any way she liked, with a view to help her to make an alienation in favour of the so called adopted son.

Held that the reversioner was estopped from questioning the alienation.

Per *Sundara Aiyar* J. *Quaere*: whether there can be any general relinquishment so as to enable the widow to alienate ?

Per *Sadasiva Aiyar* J. There can be such a general relinquishment and the alienation by the widow need not be for a consideration.

K. Narayana Row for appellant.

P. Nagabhushanam for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *August* 30.

S. A. 1461 of 1910.

A decision dismissing a suit to recover a site as owner will not operate as *res judicata* when the second suit is brought for an easement of way over the same site; though there was a finding upon an issue in the former suit, which was not embodied in the decree that the plaintiff had acquired a prescriptive right of way over the site.

T. R. Venkatarama Sastri for appellant.

A. Ramachandra Aiyar and *D. V. Nilameghachari* for respondents.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September.* 2.

S. A. 382 of 1911.

Mortgagor and mortgagee—Agreement to give ownership as from a certain date—Change of character of possession of mortgagee—Adverse possession.

A mortgagee cannot by any unilateral act of his change the character of his possession; but there is nothing to prevent the mortgagor and mortgagee agreeing that as from a certain date the mortgagee may exercise rights of ownership. Though such a mere agreement will not confer ownership yet the possession of the mortgagee will be adverse to the mortgagor from that date which can ripen in to absolute ownership by prescription.

T. V. Seshagiri Aiyar and *S. Gopalaswami Aiyangar* for appellant.

V. Ramesam for respondent.

Miller J.
Abdur Rahim J.
1912, *September* 2.

A. S. No. 76 of 1909.

Defamation—Privilege—False statements.

If a statement which is defamatory is made by a person knowing it to be false there cannot be any privilege.

T.R. Ramachandra Aiyar, T. Rangachariar and *G.S. Ramachandra Aiyar* for appellants.

S. Srinivasa Aiyangar and *T. V. Gopalaswami Mudaliar* for respondents.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 4.

C. R. P. Nos. 238 and 239 of 1911.

C.P.C. S. 115, Or. 20 r. 6—Amendment of decree—Dismissal of second appeal as not maintainable.

A dismissal of a second appeal by the High Court on the ground that no second appeal lay is not a decree which confirms the Lower Appellate Court's decree and the decree that can be executed is not that of the High Court but that of the Lower Appellate Court.

Per *Sundara Aiyar* J.—An amendment of a decree purporting to bring it in accordance with the judgment based upon a misconstruction of the judgment is one without jurisdiction and is liable to be set aside under S. 115 C. P. C.

Per *Sadasiva Aiyar* J.—The Lower Appellate Court in amending the decree acted illegally in the exercise of its jurisdiction.

T. R. Ramachandra Aiyar for petitioner.

K. Srinivasa Aiyangar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 9.

C. R. P. No. 686 of 1910.

C. P. C. S. 24 Cl. 4—Appeal—Transfer of Small Cause Suit on the file of Sub Court to Munsif's Court to be tried as Original Suit.

A suit on the Small Cause Side of the Subordinate Court for over Rs. 200 was transferred by the District Judge to a District Munsif to be tried as an Original Suit. The Munsif had small cause powers up to Rs. 50 only.

Held that no appeal lay from the decree of the Munsif, by reason of Cl. 4 of S. 24 C. P. C.

Per *Sundara Aiyar* J.—That the District Judge acted in excess of his jurisdiction in ordering the trial by the Munsif of the suit as an original suit which order cannot have the effect of estopping the parties on the question of appealability.

A. S. Venku Aiyar for *T. R. Ramachandra Aiyar* for petitioner.

S. Srinivasa Aiyar for respondent

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 9.

C. M. P. 513 of 1911.

Ganjam and Vizagapatam Rules—Execution order by Assistant Agent—No Appeal to Agent under the Ganjam and Vizagapatam Agency Rules.

No appeal lies to the Agent from the order of the Assistant Agent in execution proceedings.

V. Narasimha Aiyangar for petitioner.

N. Rajagopalachari for respondent.

Wallis J.
Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 9.

L. P. A. 32 of 1912.

C. P. C., S. 11 Exp. IV—*Res judicata—Issues—" Might and ought to have been made a ground of defence or attack."*

Explanation IV of S. 11. applies equally to suits and issues. Express decision on an issue is not necessary so as to make it *res judicata* in a subsequent suit.

Decision in a previous suit that the patta tendered was a proper one precludes the defendant in that suit from pleading in a subsequent suit that the area stated in the patta was wrong and that the landlord was the owner of and entitled to tender patta only in respect of a portion. Any such objection ought to have been taken in the previous suit. The Judgment of Sankaran Nair J. *Bagya Naidu* v. *Paradesi* overruled.

T. V. Seshagiri Aiyar for appellant.

S. Swaminathan for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 11.

S. A. 66 of 1912.

T. P. A. S. 59—Attestation—meaning of.

Attestation within the meaning of S. 59 means witnessing to the execution of the mortgage deed; and consequently attestation on acknowledgment of execution is not a valid attestation in law. [See also 23 M. L. J. 321 Ed.]

T. Natesa Aiyar for appellant.

S. Srinivasa Aiyar for respondent.

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1. (1911) I. L. R. 35 M. 218.

Wallis J.
1912, *September* 11. } Crl. R. C. 79 of 1912.

S. 2 of Workmen's Breach of Contract Act XIII of 1859.—'Workman'—A compositor in a printing press is.

A compositor in a printing press is a 'workman' within the meaning of S. 2 of the Workmen's Breach of Contract Act XIII of 1859.

N. Rajagopalachari for petitioner.

Respondent not represented.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912 September 11. } S. A. 855 of 1912.

Art. 141, Limitation Act of 1877—Widow and illegitimate son each entitled to half on propositus' death—Death of widow—Suit for the widow's half on her death—Maintainability.

Where on the death of a Sudra Zemindar his widow and illegitimate son were each entitled to a half and the illegitimate son sued a stranger in possession for his half and got a decree he is entitled to sue the stranger for the other half on the death of the widow, as the stranger's adverse possession of the other help would only bar the widow's right and not the reversionary right of the illegitimate son who as a tenant in common was not obliged to sue for the whole on behalf of the other co-tenants. *Rama Naikan* v. *Muthayammal*,[1] *Dursan* v. *Durbijoy*.[2]

C. V. Anantakrishna Aiyar for appellant.

T. Rangaramanujachariar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 11 } S.A. 1331 of 1910 and S.A. 1334 of 1910.

Adverse Possession—Municipality—Extinction of the title of municipality revives that of the Crown—Projection may be removed.

Projection of a verandah for over 12 years (this was before the amending Act of 1900) on the site of the street would give to the owner of the house a statutory title against the local authority. But having regard to the nature of the interest of the local authority

1. (1911) 21 M. L. J. 997. 2. (1909) 9 C. L. J. 623.

the result of the extinction of their title is to revive that of the Government (unless sixty years' adverse possession has extinguished the rights of Government also). Again, acquisition of title against the municipality makes the projection none the less a projection and the municipality can remove it.

J. C. Adam for appellant.

T. V. Seshagiri Aiyar and *L. A. Govindaraghava Aiyar* for respondents.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 11.

S. A. 819 of 1911.

Order 41 R. 27—" Other substantial cause."

The appellate court has power to direct the taking of additional evidence whenever it considers that the interests of justice require it. There is no reason to suppose that any " other substantial cause" in Order 41 r. 27 is *ejusdem generis* with the matters that go before it.

T. R. Ramachandra Aiyar for appellant.

L. A. Govindaraghava Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912 *September* 11.

S. A. 877 1911.

Malabar Law—Necessity—Karnavan's power to grant melcharth—Manusham—Karnavans' right to.

It is not competent to Malabar Karnavan to anticipate and give melcharths long in advance of the expiry of the previous Kanoms, in the absence of clear proof of necessity. Proof of necessity is not merely proof of a valid purpose; in addition, it cannotes proof that the karnavan had no other available funds in his hands. There is no warrant for the position that the Manusham or renewal fee is the Karnavan's perquisite to be disposed of as he pleases; it is as much family income as any other and the power of the Karnavan is as limited in its disposal as in other cases.

C. Madhavan Nair for appellant.

C. V. Ananthakrishna Aiyar for respondent.

NOTES OF RECENT CASES.

Offg. C. J.
Sankaran Nair J.
1912, *September* 16.

O. S. A. No. 37 of 1911.

S. 90 T. P. Act—Limitation for executing personal decree.

A mortgage decree which directed "that the mortgagors do pay the decree amount" that the mortgaged properties be sold in default of payment and that any unsatisfied balance be recovered from the mortgagors is one which imposes a personal liability for enforcing which in execution limitation begins from the date of the decree and not from the date of exhausting the mortgaged properties in execution.

T. Ethiraja Mudaliar for appellant.

C. P. Ramaswami Aiyar for respondent.

Miller J.
Abdur Rahim J.
1912, *September* 17.

A. S. No. 209 of 1908 & 46 of 1909.

Evidence—Admissibility of letter to show sale inoperative as intention was to create mortgage,—Letter unregistered.

Where a suit was brought alleging that a deed of sale in favour of the defendant was inoperative inasmuch as it was intended to operate only as a mortgage which it could not as the letter which was intended to give effect to the intention of the parties was not registered and this letter was sought to be admitted in evidence for the purpose of showing the intention of the parties.

Held, by *Abdur Rahim* J. that the letter was admissible as it was not sought to be used either to affect immoveable property or as evidence of a transaction affecting immoveable property.

Held, by *Miller* J. that the letter was in effect sought to be used to affect immoveable property and was inadmissible.

T. R. Ramachandra Aiyar and *R. Kuppusami Aiyar* for appellant in A. S. 46 of 1909.

P. Narayanamurthi for respondent in A. S. 46 of 1909.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 17.

S. A. 325, 329, 311 & 399 of 1911.

Inam—'Sudda Inam'—Meaning of—Enfranchisement—Effect of.

The expression 'Sudda Inam' in an Inam title deed does not show that the land itself was the Inam and not the melwaram only. It only means that the Inamdar is exempt from paying anything to Government in respect of the Inam.

Where the lands were in the enjoyment of the defendants and the melwaram was enjoyed by the plaintiff as Karnam Inam and the Government then enfranchised it by giving up its right of resumption, the effect of the enfranchisement was to leave the rights of the parties in the land unaffected.

S. Srinivasa Aiyar for appellant.

C. V. Anantakrishna Aiyar for respondent.

Sadasiva Aiyar J.
1912 September 19.

C. R. P. No. 19 of 1911.

Suit on express contract—Decree on quantum meruit—Use of court's experience in assessing damages—No interference under S. 25 Provincial Small Cause Courts Act, where no injustice.

In a suit upon express contract, when it is not proved, it is open to the court to pass a decree on *quantum meruit* for services done. It is open to the court when there is evidence as to the period, nature etc., of the service to assess its value on the basis of what is fair and reasonable according to the view of the court though there is no express evidence as to the value of the service. In any event, when no injustice is done the court is not bound to interfere in revision under Sec. 25 of the Provincial Small Cause Courts Act merely on the ground that there was some irregularity.

K. Ramanatha Shenai for petitioner.

B. Sitarama Rao for respondent.

NOTES OF RECENT CASES.

Full Bench.
Offg. C. J.
Sankaran Nair J.
Sundara Aiyar J.
1912, *September* 20.

L. P. A. No. 118 of 1911.

Appellate Court—Power to take additional evidence.

The Full Bench agreed with Phillips J. in this case and held that it was competent for the appellate Judge to take additional evidence on appeal to enable him to pronounce judgment to his satisfaction.

[See *Somasundaram Chetty* v. *Babu* alias *Ramu.*[1] Ed.]

K. Jagannada Aiyar for appellant.

K. V. Krishnaswami Aiyar for respondent.

Full Bench.
Offg. C J.
Sankaran Nair J.
Sundara Aiyar J.
1912, *September* 20.

L. P. A. No. 126 of 1911.

Trespass to a very small degree—Injunction, proper remedy and not damages.

The Full Bench agreed as to the rights of the parties in the above case with the view of Mr. Justice *Abdur Rahim* in *Subba Naidu* v. *Ethirajammal* [2]).

C. V. Ananthakrishna Aiyar for appellant.

K. Bhashyam for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 24.

C. R. P. 490 of 1911.

Abatement of suit, partial—Suit for possession under oral will or declaration of invalidity of alienation by widow—Death of plaintiff—Abatement of suit as to declaration.

1. (1911) 22 M. L. J. 62.
2. (1911) 22 M. L. J. 14.

A suit was brought for possession under an oral will of the defendant's husband and in the alternative to set aside an alienation by her (a Hindu widow). Pending the suit the plaintiff died.

Held the suit abated as to the relief for declaration of invalidity of the alienation.

K. V. Krishnaswami Aiyar for petitioner.

G. S. Ramachandra Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912 *September* 29.

S. A. 1263 of 1911.

C. P. C. (XIV of 1882) S. 294—Purchase without permission of Court—Objection by stranger.

An objection on the ground of want of court's permission under S. 294 C. P. C. (1882) for a purchase in a court's auction cannot be taken by a stranger to the proceedings.

G. S. Ramachandra Aiyar for appellant.

C. Krishnamachari for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *September* 30.

S. A. 1155 of 1911.

Malabar Law—Maintenance—Right of ladies living with their husbands, to.

A lady of North Malabar belonging to a Nayar Tarwad is entitled to maintenance from her Tarwad house during her stay with her husband in his Tarwad house. A junior member is entitled to maintenance even away from the Tarwad house provided he or she stays out for a proper purpose. Living with the husband is a proper purpose and according to the notions of the people, very respectable for the lady as well as the Tarwad. It may even be said that her stay with the husband is with the consent of the Karnavan inasmuch as that it is he that gives away in marriage and sends the girl away to her husband according to the custom of the people spoken to in the case.

T. Richmond for appellants.

B. Sitarama Rao for the *Hon'ble the Advocate General* for respondent.

NOTES OF RECENT CASES.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 2.

S. A. 111 of 1911.

Limitation Act, Art. 85—Mutual, open and current accounts —Test.

Shifting balance is not necessary for an account being mutual open and current though it is an important factor in considering whether there was such an account. The test is whether there were mutual demands and not mere payments towards what was due to the other side.

Shivee Gowda v. *Fernandez*[1] *Velu Pillai* v. *Ghose Mahamad*[2] followed.

T. V. Seshagiri Aiyar for appellant.

V. Purushothama Aiyar for respondent.

Ayling J.
Napier J.
1912, *October* 2.

Crl. R. C. 44 of 1912.

Cr. P. C. S. 439—S. 145, No revision of order under S. 145—Charter Act 15—No interference under, except on questions of jurisdiction.

No revision to the High Court will lie under S. 439 Cr. P. C against orders passed under S. 145 Cr. P. C.

No revision will be entertained under S. 15 of the Charter Act against orders under S. 145 Cr. P. C. except on questions as to jurisdiction of the lower court.

T. V. Seshagiri Aiyar for petitioner.

E. R. Osborne and *V. Ryru Nambiar* for respondent.

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1. (1910) I. L. R. 34 M. 513.
2. (1894) I. L. R. 17 M. 393.

Ayling J.
Napier J.
1912, *October* 2.

A. S. 202 of 1909.

Art. 120, 125 Limitation Act—Suit by remote reversioner to set aside alienation.

A suit by a remote reversioner for a declaration of the invalidity of a widow's alienation is governed by Art. 120 and not Art. 125 of the Limitation Act and the right to sue accrues ordinarily from the date of the alienation.

P. Nagabhushanam for appellant.

B. Narasimha Row for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 2.

S. A. No. 1218 of 1911.

Madras Estates Land Act—Jurisdiction—Revenue Courts—Inam granted by Zamindars—Whether an estate.

Though an inam granted by a Zamindar subsequent to the Permanent Settlement, from his estate, may not come within the definition of an estate under S. 3 of the Estates Land Act, yet the person holding the land *i. e.*, the grantee of the inam, is a landholder within the meaning of the Act and a suit brought by him to recover rent against his tenant is cognizable only by a revenue court.

B. Narasimheswara Sarma for appellants.

P. Narayanamurthi for respondents.

Offg. C. J.
Sankaran Nair J.
Sundara Aiyar J.
1912, *October* 2.

Ref. C. No. 9 of 1912.

Legal Practitioners Act S. 13—Pleader—Grossly negligent, fraudulent or wilful default to appear—Judgment and evidence in suit for refund—Admissibility of—Part payment of fees—Liability of pleader to appear.

A judgment and evidence in a suit for refund of fees against a pleader for neglect to appear is admissible in evidence against him

though not as conclusive evidence when he is called upon to answer a charge for that neglect under S. 13 of the Legal Practitioners Act.

A pleader is bound to conduct a case up to the end though his fees have not been fully paid, unless there is an agreement to the contrary.

A false defence by the pleader in the suit for refund of fees that he was engaged for the fee only to appear up to one stage of the case is an aggravation of his offence under the above Act which is constituted by the gross, wilful or fraudulent neglect to appear when in duty bound to appear.

Advocate-General for the court.

T. Rangachari and *S. Ranganada Aiyar* for pleader.

K. Srinivasa Aiyangar for Vakils' Association.

Offg. C. J.
Sankaran Nair J.
Sundara Aiyar J.
1912, *October* 2.

Ref. C. 10 of 1912.

Legal Practitioners Act S. 13—'Actionable claim'—Pleader, purchase by—Actionable claim, still so, even after filing suit–T.P. Act Ss. 3, 136.—Grossly unprofessional conduct—Rule 27 of High Court—Breach of—No charge of—Costs of petitioner to be paid by Vakil.

An actionable claim does not cease to be so because of filing a suit thereon. A pleader getting a highly speculative transfer of the subject of a suit violates the provisions of S. 136 of T. P. Act and is guilty of grossly unprofessional conduct.

Held, also that the pleader was wrong in carrying on trade without reporting to the High Court. The pleader was directed to pay the costs of the petitioner.

Per *Sundara Aiyar* J.—A pleader must be held to be carrying on a trade if his family is conducting a trade though through servants, managers or clerks and he is guilty of professional misconduct though he has not been specifically charged with the violation of a rule of the High Court requiring pleaders to obtain permission before doing so. Carrying on trade is inconsistent with the honour-

able discharge of professional duties and if permission would not have been granted if applied for before, he takes the risk of being held guilty of professional misconduct if he is found to be carrying on the trade. The law as to this is similar to that in the case of a trustee not taking the permission of the court before hand in respect of a dealing of his with the trust estate.

Sankaran Nair J.—No definite or hard and fast rule can be laid down on the question whether a Pleader or Vakil can or cannot carry on a trade, but sufficient provision has been made by Rule 27 of the High Court Rules to see whether permission should be given or not in the particular cases applied for. In the present state of the country it is unnecessary to say whether carrying on trade would amount to professional misconduct.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October 3.*

S. A. 1315 of 1911.

S. 55 T. P. Act—' Title '—Meaning of "covenant for title."

A title which cannot be enforced against a stranger in possession is not a good title such as is contemplated by S. 55 T. P. Act.

S. Krishnaswami Aiyangar for appellant.

W. Barton for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 3.

S. A. 1147 of 1911.

Genuineness of document—Finding by District Registrar not conclusive in suit.

The finding of the District Registrar in favour of the genuineness of a will is not conclusive in a suit brought on the will.

T. Prakasam for appellant.

L. A. Govindaraghava Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 3.

L. P. A. 86 of 1912.

C. P. C. Order 40, R. 1—*Property, subject of dispute only.*

A receiver cannot be appointed under order 40, rule 1, in respect of property which is not the subject of dispute in the case.

N. Chandrasekhara Aiyar for appellant

S. Swaminathan for respondent.

Ayling J.
Napier J.
1912, *October* 4.

A. S. 41 of 1910.

Specific Performance—Contract of sale by manager—Specifically enforceable though one of the members, minor—Contract by manager may be shown to be such by reference to surrounding circumstances.

An agreement for sale entered into by the manager of a Hindu family stands unaffected by the judgment of the Privy Council in *Mir Sarwarjan* v. *Fakkruddin.*[1] Specific performance of such an agreement may be directed even against minor members is found beneficial. It may be shown by reference to surrounding circumstances that a person though not purporting to act as manager did as a matter of fact act as manager in the particular transaction.

The court refused specific performance in this case *inter alia* on the ground that the sale was not beneficial to the family, the property fetching in less than a month after the contract Rs. 525 more (the original price was Rs 2375). Where a contract for sale entered into by the son in respect of the family property was attested by the father the admitted manager of the family but is found not to be binding against the family no decree can be passed against the sons for damages or for specific performance in respect of the share of the father when the father dies before the decree for specific performance is given.

K. Srinivasa Aiyangar and *B. Sitarama Row* for appellant.

T. Rangachariar for Respondent.

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1. (1911) I. L. R. 39 C. 232.

Sankaran Nair J.
1912, *October 4.*

C. R. P. No. 140 of 1911.

Presy. S. C. C. Act, S. 38, Rule 223—Order in garnishee proceedings—Claim to be tried as a suit.

An appeal lies to the Full Bench of the Presidency Small Cause Court from the order on a claim petition in garnishee proceedings and no revision under S. 115 C. P. C. is entertainable.

S. Ramaswami Aiyar for petitioner.

R. Rangasami Aiyangar for respondent.

NOTES OF RECENT CASES.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 8.
S. A. No. 217 of 1912.

Hindu Law—Stridhana of a maiden—Step-mother preferential heir to maternal aunt.

A step-mother is a preferential heir of a deceased Hindu maiden to the maternal aunt.

B. Sitarama Rao for appellant.

K. Y. Adiga for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 11.
S. A. 1416 of 1911.

Nuisance to public way—Special damages, necessity to prove.

Held.—In a suit for removal of an obstruction to public cart, track and for damages, mere proof that plaintiff was prevented from taking his cart to his neighbouring field without proof of special damage beyond and over that which the public suffers is insufficient for plaintiff to succeed though he might be inconvenienced more often than others.

Actual pecuniary damage may not be necessary in all cases.

S. Swaminadhan for appellant.

K. Naraina Row for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 11.
S. A. No. 117 of 1911.

Landlord and Tenant—Suit after Estates Land Act without tender of patta for prior Fasli—Maintainability of—Chit Nottam cess—Legality of.

A suit for rent can be instituted after the Estates Land Act without tender of patta for a fasli prior to the Act, as the tender is only a mode of enforcement of right and does not create a right to the rent; it is only a processual and not a substantive right.

'Chit nottam' cess which is one payable for testing coins paid by tenant, is illegal and not recoverable.

L. A. Govindaraghava Aiyar for appellant.

T. Rangachari for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 11.

S. A. No. 1451 of 1911.

Archaka office—Land attached thereto—Mortgage of both—Legality of.

An usufructuary mortgage of an Archaka Office in a temple and the lands attached thereto is not illegal and can be redeemed. The transaction is merely void, the result of which is that the property is not vested in the transferee. A direction in the decree to sell the office in case of non-payment is illegal and ought to be expunged.

S. T. Srinivasa Gopalachariar for appellant.

M. K. Narayanasami Aiyar and *G. S. Ramachandra Aiyar* for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 11.

S. A. 1283 No. of 1911.

Guardian and Ward—Power of natural guardian to sell ward's estates—Justifying circumstances for sale—'Necessity.' benefit—Meaning of—Guardian's duty to discharge debts by sale or mortgage—Cases reviewed—Costs.

Sundara Aiyar J.—A natural guardian's powers in dealing with the ward's property are not in any way less than those of an appointed guardian; on the other hand they are not as restricted as those of the latter. The question necessary for consideration is whether the transaction is for the benefit or necessity of the ward. 'Necessity' is when one has to avoid an evil. That which will positively tend to promote the minor's welfare is beneficial to him.

A discharge of debts due by a minor's estate may be good as a necessary act though there may have been no demand by the creditors.

What would be proper or prudent when dealing with one's property will not be so when dealing with a minor's estate. The guardian may either sell or mortgage a portion of the minor's estate to

discharge the debts and enable him to incur other necessary expenses according as he thinks fit under the circumstances.

Costs ought not to have been disallowed to a successful party merely because difficult questions of law were involved.

Sadasiva Aiyar J.—Pressure or necessity is no test for the validity of a guardian's alienation. Alienation (sale or mortgage) is good and binding on the minor if the guardian does so after exercising his discretion he had, under all the circumstances.

T. R. Venkatarama Sastri for appellant.

T. V. Seshagiri Aiyar for respondent.

Sankaran Nair J.
1912, *October* 11.
C. R. P. Nos. 520 and 521 of 1912.

Act XIX of 1841—' Succession '—Not applicable to cases of lapsing in Malabar tarwads—Enquiry—Necessity for.

Act XIX of 1841 applies only to cases of ' succession ' and not to cases where the estate of a deceased Karnavan of a Malabar tarwad lapses to the tarward on his death.

Obiter :—An enquiry, must be held in cases under the Act, an order passed without an enquiry and even on *prima facie* grounds is illegal and liable to be set aside as made without jurisdiction.

C. Madhavan Nair for petitioner.

C. V. Anantakrishna Aiyar for respondent.

Sankaran Nair J.
Abdur Rahim J.
1912, *October* 11.
S. A. No. 1831 & S. A. 1834 of 1908.

Madras Act VII of 1865—Madras Act III of 1905—New water cess on wet crops—Legality of—Dam, construction of, across an irrigation river—Natural right—Prescription.

The ownership of the bed of a natural stream was determined in this case (filed before the Madras Act III of 1905) from the survey map, village accounts, etc., to vest in the proprietor and not in the government. New water cess can be imposed only if additional water is taken through the same old sources. The cess is not for the kind of crop though it may be newly raised but for additional water taken if any. It is a natural right of every riparian proprietor to take water for irrigation from a natural stream passing by his lands

Irrigating one's lands by erecting dams across the stream, if necessary, in times of scarcity is customary in India from ancient times. Erecting dams when the water is only knee-deep is reasonable.

The Advocate-General (*J. L. Rosario*) for appellant.

T. Rangachariar, S. Srinivasa Aiyangar, S. Muthia Mudaliar R. Narayanaswami Aiyar, S. Ramaswami Aiyar and *A. Swaminada Aiyar* for plaintiff—respondent.

K. Srinivasa Aiyangar and *S. E. Sankara Aiyar* for 4th defendant—4th respondent.

Sankaran Nair J.
Napier J.
1912, *October* 15.
A. S. No. 41 of 1909.

Rateable distribution—Mortgage decree-holder—Judgment-debtor personally exonerated—Not entitled to.

A mortgage decree-holder who has got only a mortgage decree, (the morgagors being also expressly exonerated personally) cannot apply for rateable distribution along with money decree-holders. The fact that such a decree has been held to be a money decree, does not entitle the decree-holder to claim a rateable distribution. It is a money decree in so far as the remedy against the property goes; it does not attract in addition the right to have rateable distribution when the decree does not give the right to proceed against the other property of the judgment-debtor. When the decree in terms is a personal decree or an order is made under S. 90 the mortgagee is entitled to claim rateable distribution.

S. Srinivasa Aiyangar for appellant.

P. Narayanamurthi for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 15.
C. M. A. 218 of 1911.

Construction—Power of attorney—Strict construction.

A power of attorney must be strictly construed. An authority to realise decrees does not include authority to transfer the same for less than their face value.

V. Viswanatha Sastry for appellant.

B. Sitarama Rao for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 15.

S. A. No. 404 of 1911.

C. P. C. S. 102—Claim for declaration and Melwaram—Separate Court fee for declaration—Second appeal lies.

When in addition to a claim for melwaram there is also a claim for declaration for which court fee is separately paid with a view to have a binding declaration for all time, a second appeal lies though if the claim was merely for melwaram a second appeal would not lie.

S. Srinivasa Aiyangar for appellant.

K. V. Krishnasawmi Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 17.

Memo of objection in S. A. 53 of 1911.

Mortgage—Mortgagee purchasing share of a member of mortgagor's family—Dispute as to quantum—Tender of proportionate share found correct—Transfer of Property Act S. 76—Liability to account for receipts.

The mortgagee of certain immoveable property became the purchaser of the share of one of the members of the mortgagor's family. There was a dispute as to what share that member was entitled to exactly. On the footing that he was entitled to the lesser share (the view that was ultimately upheld by the court), a tender was made of the mortgage money with proportionate reduction which the mortgagee refused to accept. The question was whether the mortgagor was entitled to an account of the gross receipts under S. 76 T. P. Act. *Held* under the circumstances, the section did not apply.

T. R. Venkatrama Sastri for appellant.

K. Ramachandra Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 17.

C. M. A. 88 of 1912.

Lunacy Act—Malabar Law—Karnavan Manager cannot be appointed for.

A manager cannot be appointed under the Lunacy act for a karnavan of a Malabar Tarwad.

T. R. Ramachandra Aiyar for appellant.

The Advocate General (*J. L. Rosario*) for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, *October* 17.

S. A. No. 1375 of

Act II of 1894 S. 17—"Continued" meanin

When there is nothing to show that an inam of a Village officer was granted by the Crown proved than that the village officer is in enjoyment interference of the Government, the inam cannot b ed or continued by the Government so as to bring the Madras Proprietary Estates Act II of 1894.

The Government Pleader (*L. A. Govindara*; appellant.

V. Ramdoss for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1912. *October* 18.

S. A. No. 356 of 19

Ottidar's Right of Pre-emption—Nature of tation Act, Art. 10.

The customary right of pre-emption of the o consists in having an offer made to him of the equ at the price which another is willing to pay for it. T of limitation in such a case necessarily cannot be date of notice. Their Lordships expressed hesitati with the view that it could be later than the date of of the Limitation Act would not apply to the case chaser and when the person seeking pre-emption The appropriate article is Art. 120, the starting poin the sale.

The Advocate General (*J. L. Rosario*) for app
T. V. Seshagiri Aiyar for respondent.

Miller J.
Sadasiva Aiyar J.
1912 October 18.

S. A. No. 1191 of

Evidence Act Ss, 13 and 35—Recital of a mo certificate not evidence of the existence of the mort

A statement in a sale certificate that the proper a mortgage is not evidence of the existence of the under S. 13 or S. 35 of the Evidence Act.

C. V. Ananthakrishna Aiyar for appellant.
C. Madhavan Nair for *the Advocate General*

OF RECENT CASES.

S. A. No. 1490 of 1911.

tion with a widow—Construction of, as its.

ition deed "henceforth we shall not dispute d by any of us" do not give a widow of one er powers than she would otherwise have

am for appellant.
spondent.

A. S. Nos. 129 and 255 of 1909.

utravakasom property—Right of members

rs of a Marumakkattayam family constituting vakasom property are entitled to get main- avakasom property when it is not shown that ent means to maintain them.

ishna Aiyar for appellant.
r respondent.

A. S. No. 200 of 1909.

3.

minor—Suit instituted on the date of filing of amendment—Limitation Act, S. 22.

suit was instituted in the name of three people them had in fact attained majority at the essary amendment was made, limitation period nevertheless, the suit was not barred, description nor being a mere misdescription and irregularity.

ighava Aiyar appellant.
Rao for respondent

The Chief Justice
Sankaran Nair J.
1912, *October* 28.

S. A. Nc

Mortgage—Interest—Rate of—Mist quent incumbrances.

Where in a mortgage document the as one per cent. per annum instead of one mistake, such mistake can be relieved and subsequent mortgagor unless he can prov in the mortgaged property in good faith.

C. V. Anantakrishna Aiyar for appel-

S. Swaminathan for respondent.

Sadasiva Aiyar J.

1912, *October* 30.

C. M. P. 2

Petition for taking security after mon sion of law.

If at the time a person draws out mone was entitled to do so without furnishing s vision of law by which a court could compel thereafter.

M. D. Devadoss and *P. R. Narayanasw*

N. Rajagopalachari for respondent.

Miller J.
Abdur Rahin J.
1912, November 1.

A. S. No. 141 o

T. P. A. S. 76 (*c*), (*d*) *and* (*h*)*—Mode of ac Repairs etc., to be paid first—Interest next.*

The proper mode of taking accounts in the possession is—first to deduct payments for publi repairs and apply the balance in reduction of i other way about.

C. V. Ananthakrishna Aiyar for appella

J. L. Rosario for respondent.

NOTES OF RECENT CASES.

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Benson J.
Sundara Aiyar J.
1912, *November* 1.

L. P. A. 59 of 1910.

Landlord and Tenant—Mulgeni or Chalgeni—No presumption of Chalgeni—50 Years' possession on payment of uniform rent.

In South Canara, where mulgeni tenure is quite common, the court would not be wrong in refusing to find a tenure chalgeni when it is found that the tenant has been in possession for over half a century paying a uniform rent.

C. Madhavan Nair and *G. Annaji Rao* for appellant.

B. Sitaram Rao and *K. Y. Adiga* for respondents.

Sadasiva Aiyar J.
1912, *November* 4.

S. A. No. 555 of 1912.

(Under O. 41 R. 11 C.P.C.) Hindu Law—Father prima facie represents son in litigation.

A Hindu father *Prima facie* represents his undivided sons in all litigations.

M. V. Krishnaswami Aiyar for appellant.

Benson J.
Sundara Aiyar J.
1912, *November* 6.

C. R. P. No. 313 of 1911.

Limitation Act Ss. 19, 20—Part payment by maker after universal gift—Effect of.

Payment by the maker of a promissory note after a universal gift by him of his property keeps the debt alive not only against the maker but also against the donee.

T. S. Ramaswami Aiyar for *T. R. Venkatrama Sastri* for petitioner.

S. Muthia Mudaliar for respondent.

Benson J.
Sundara Aiyar J.
1912, November 12.

S. A. No. 1270 of 1910.

Easement—Right to a privy on another's land.

Quaere.—Whether a right to use another's land for a privy is an easement known to law.

V. Venkatachariar for appellant.

C. V. Anantakrishna Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1912, November 12.

S. A. No. 2149 of 1910.

Burden of proof—Benami—Want of possession does not shift onus of proof as to benami.

Where a sale deed stands in the name of the plaintiff as well as the defendant, it is not right to say that the plaintiff is bound to prove that his name is not on the sale deed benami for the defendant. It is for the defendant to prove that the plaintiff is a mere benamidar with no beneficial interest.

T. Narasimha Aiyangar for appellant.

M. K. Narayanaswami Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1912, November 13.

C. M. A. 269 of 1911.

Mortgage decree—Limitation—The date of the order absolute the starting point.

In the case of mortgage decrees for sale limitation for execution commences with the order absolute.

L. S. Veeraraghava Aiyar for appellant.

C. V. Anantakrishna Aiyar for respondent.

Sundara Aiyar J.
Sadasiva Aiyar J.
1912, November 13.

S. A. No. 1581 of 1911.

Landlord and Tenant—Assignment by tenant—Liability of assignee only for proportionate rent.

Where a tenant for a term assigns his right to another and the assignee is in possession only for a limited period he having assigned

this right to a third person the landlord cannot claim from the assignee more rent than was proportionate to the period occupied by him.

C. V. Anantakrishna Aiyar for appellant.

K. Govinda Marar for respondent.

Benson J.
Sundara Aiyar J.
1912, *November* 15.

C. M. A. No. 117 of 1911.

C. P. C. S. 16 (d).—Suit for declaratian as to immoveable property beyond Court's jurisdiction—Maintainability of.

A court has no jurisdiction to entertain a suit for a declaration that a mortgage of lands situated beyond the Court's jurisdiction is invalid as the same contravenes S. 16 (*d*) of the new Civil Procedure Code.

T. Rangachari and *C. S. Venkatachari* for appellant.

C. V. Anantakrishna Aiyar and *K. S. Krishnaswami Aiyangar* for respondent.

The Chief Justice
Sankaran Nair J.
1912, *November* 15.

O. S. A. P. No. 4 of 1912.

Insolvency Act (Presidency Towns)—Claim to goods attached—Declaration in insolvency—Suit, maintainability of.

After an order by the Insolvency Commissioner to the effect that certain goods seized as belonging to the insolvent did not belong to the claimant but belonged to the insolvent alone, no regular suit will lie to contest the said order.

A Krishnaswamy Aiyar for appellant.

M. D. Devadoss (with M. K. Ramaswami Aiyar) for respondent.

Miller J.
Rahim J.
1912, November 18.

S. A. No. 580 and 586 of 1907.

Trustee of Mosque—Inam grant of Melwaram in kind by former Government—Trustee not entitled to convert into fixed money equivalent—No estoppel against breach of trust.

A trustee of Mosque for the support of which the Melwaram of certain lands, payable to Government in kind, was granted as Inam is not entitled to convert it into a fixed money equivalent for all time by any arrangement with the Kudivaramdar. The fact that the

British Government at the time of confirming the Inam in 1864 estimated the Melwaram at a certain money value does not compel the Inamdar to adopt that amount as the one payable by his tenant as such estimate by the Government was only for fixing the amount of Quit-rent payable to the Government on the land; and as the government would have no power to deal with the Melwaram in any way the same having been already parted with in favour of the Mosque. Mere payment of Melwaram in money and at a fixed amount even for more than 30 years is no evidence of a contract to that effect in the absence of any plea to that effect; nor does it estop the trustee from now reverting to the old system of payment in kind, even if pleaded unless such a contract is shown to be beneficial for all times.

N. Rajagopalachari and *P. R. Ganapati Aiyar* for *S. Srinivasa Aiyar* for appellants.

K. Srinivasa Aiyangar and *C. Krishnamachari* for respondents.

Benson J.
Sundara Aiyar J.
1912, *November* 19.

C. M. A. No. 205 of 1911.

Appeal—Sanction by the Dt. Judge against Amin—Appeal to the High Court.

An appeal lies to the High Court from an order by the Dt. Judge giving sanction or revoking sanction against the Amin of the court; the Dt. Judge being subordinate to the High Court in that matter under the Civil Courts Act.

Costs were allowed in this case though the appeal was against the order revoking a sanction.

K. V. Krishnaswami Aiyar for appellant.

N. T. Shamanna for respondent.

Benson J.
Sundara Aiyar J.
1912, *November* 21.

Cr. App. 119 of 1912.

No appeal lies to the Sessions Judge of Ganjam from the judgment of a Sub-divisional Magistrate having his head-quarters within the Ganjam Sessions Division to whom an agency case has been transferred by the Dt. Magistrate of Ganjam in his capacity as the Dt. Magistrate of the agency tract (the Sub-divisional Magistrate having also some agency jurisdiction).

Public Prosecutor (C. F. Napier) for the Crown.

T. V. Sheshagiri Iyer (*amicus curiale*) for the accused.

Benson J.
Sundara Aiyar J.
1912, *November* 22.

S. A. No. 1957 of 1911.

Estates Land Act S. 151—Action in ejectment—Against co-owner owning kudivaram, unsustainable.

Revenue Courts have no jurisdiction to entertain an action in ejectment under S. 151 of the Estates Land Act by one landlord against his co-landlord who owns an Ardhamaniem in the melvaram as well as the Kudivaram in certain of the lands. His proper remedy lies in the Civil Courts.

C. S. Venkatachariar for appellant.

K. V. Krishnaswami Aiyar for *M. K. Narayanasami Aiyar* for respondent.

Benson J.
Sundara Aiyar J.
1912, *November* 22.

C. M. S. A. No. 70 of 1911.

Res judicata—Execution—Order ex parte.

An order returning the application for execution, on the ground that the interest ought to be calculated in a particular way is *res judicata* in a subsequent application for execution although the order was made without notice to the other side.

K. V. Krishnaswami Aiyar for appellant.

C. V. Anantakrishna Aiyar for respondent.

Miller J.
Abdur Rahim J.
1912, *November* 25.

A. S. No. 204 of 1910.

Minority—Appointment of administrator during minority—Postponement of minority.

The appointment of an administrator during minority under the Probate and Administration Act has not the effect of postponing majority under the Indian Majority act.

T. V. Seshagiri Aiyar for appellant.

T. Rangachariar for respondent.

Benson J.
Sundara Aiyar J.
1912, *November* 26.

C. M. A. 268 of 1911.

C. P. C. 230 (S. 48)—Minority—No ground for extension—Ascertainment of mesne profits—Proceedings in execution.

The rule of 12 years' limitation laid down in S. 230 (present Sec. 48) C. P. C. is absolute and no extension is permissible on the ground that the decree-holder was a minor at the time of the passing of the decree.

Proceedings for the ascertainment of mesne profits under the old Code are proceedings by way of execution and not proceedings in suit.

Whether the decree is complete or otherwise is to be determined by the law as it stood at the date of the passing of the decree and not by the law as it stands when the application is made subsequently for the carrying out of the decree.

T. V. Muthukrishna Aiyar for appellant.
S. Subramania Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1912. *November* 26.

S. A. 2104 of 1910.

Revenue Recovery Act, S. 59—Limitation Act, S. 15—Applicability of.

Section 15 of the Limitation Act, applies to suits governed by S. 59 of the Revenue Recovery Act.

T. Rangachariar for appellant.
The Government Pleader for respondent.

Miller J.
Abdur Rahim J.
1912. *November* 27.

Appeals 32 of 1909.

Mortgage—Salvage lien—"Interest"—S. 69, 70, Indian Contract Act.

A mortgage was effected partly with a view to pay off a simple decree debt for which attachment had been placed on the land mortgaged. The mortgagee failing to so pay, the property was sold and to set aside the sale the mortgagor mortgaged the property to a third party and with his funds the decree amount was deposited and the sale was set aside.

Held: Under the circumstances the second mortgagee had no priority over the first. S. 69 I.C.A., did not apply to the case because the interest contemplated under that section is antecedent interest and not interest created by the payment. Nor would S. 70 apply as the payment was made in the payer's own interest and not in the interest of the prior mortgagee though the former might be benefitted by the transaction.

T. R. Ramachandra Aiyar for appellant in A. 32 of 09.
S. Srinivasa Aiyar (with him) *K. Srinivasa Aiyangar* for respondents in A. 32 of 09.